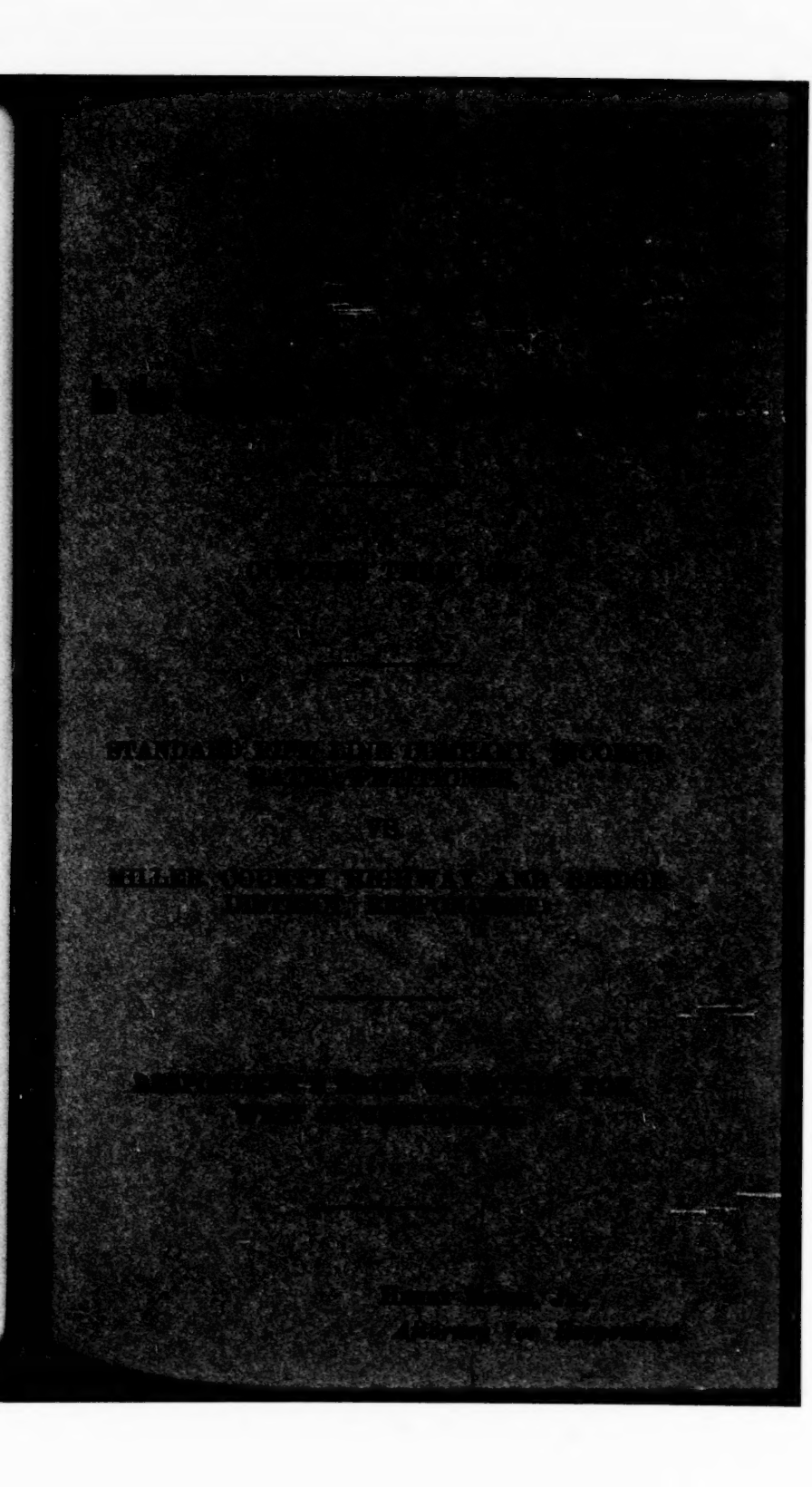

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No. 577.

In the Supreme Court of the United States

OCTOBER TERM, 1927.

STANDARD PIPE LINE COMPANY, INCORPORATED, PETITIONER,

VS.

MILLER COUNTY HIGHWAY AND BRIDGE DISTRICT, RESPONDENT.

STATEMENT OF THE CASE.

Miller County Highway & Bridge District was organized by special act of the Arkansas Legislature during the year 1915. It was found that funds were not available to build both the roads and the bridge, so a special act authorizing the bridge built and another act confirming the assessment of benefits that had been made for the roads and authorizing the roads built separately, was passed by the General Assembly of the State of Arkansas during the year 1917.

A third act again confirming the assessment of benefits and authorizing certain roads paved with

hard surface materials was passed by the General Assembly of the State of Arkansas, during the year 1925, being Act No. 83. Since that time, because the burden of road taxes had become so great as to virtually confiscate the lands in many counties of the state, Act No. 11 (known as the Martineau Act, because the present Governor, J. E. Martineau, was elected on a platform to remove the road taxes from the land), was passed by the General Assembly during the year 1927, which removes all road taxes, the outstanding bonds being paid and new roads being built from a tax of five (5) cents a gallon on gasoline.

The petitioner, the Standard Pipe Line Company, Inc., brought this suit in the U. S. District Court at Texarkana to enjoin the collection of further road taxes on the right of way and pipe lines of the petitioner, said petitioner had paid its road taxes for three (3) years before bringing this action.

The highway district filed its motion to dismiss petitioner's bill in equity as petitioner had not availed itself of the administrative remedies afforded by the statute to have its taxes reduced. The district court overruled such motion to dismiss and upon a trial on the merits, found in favor of the petitioner and enjoined collection of the taxes at issue.

Upon appeal, the Circuit Court of Appeals for the Eighth Circuit reversed the decision of the U. S. District Court and petitioner has now applied for a writ of certiorari to the circuit court of appeals.

TESTIMONY.

As supplementary to the testimony presented in petitioner's brief, we present the following to save this court the necessity of searching the record.

T. B. Morris, bookkeeper for the Texarkanian, the paper in which the notice of assessment of benefits was published, identified the assessment of benefits as published and stated that the paper had a general circulation during the year 1920 and that Mr. Hilford, general manager of the petitioner's pipe line at Texarkana, was a subscriber to said paper (Tr. pp. 35 to 38).

Louis Josephs, the secretary of the highway district identified the original assessment book, showing the assessment of the right of way of the Pipe Line Company, which pipe line and telegraph line is assessed at $59,340.00, same being the total assessment for road purposes (Tr. pp. 42 to 50).

George T. Conway, one of the assessors, stated that the zoning system was used in the country that in the City of Texarkana, the assessment for county and state purposes was used and that all town lots were assessed on an *ad valorem* basis, using as the benefit the county and state assessment. That in assessing right of way of pipe line of petitioner, the county and state assessment basis was used as in the City of Texarkana, the same basis also being used for

the telegraph and telephone company lines and all other public utilities.

The reassessment of benefits was made because the roads were not built as originally laid out, thus causing some lands to be adjacent to the road that formerly were in the third zone, and other lands to go into the third zone that formerly were in the first zone. No changes were made in the assessment in the City of Texarkana or in the public utilities.

Mr. Conway testified that Mr. Hilford, superintendent of the pipe line property in Miller County, had an office adjoining his and that he was informed fully about both the first and second assessment (Tr. pp. 53 to 65).

A. B. Little, testified that while assisting in collecting the taxes in Miller County, he notified the tax commissioner of the Pipe Line Company about the road taxes during the year 1917 (Tr. pp. 65 to 72).

W. D. Fulton, chief engineer of the Pipe Line Company admitted that his company could haul cheaper and quicker over a hard surface road than over the dirt roads and that they used about sixty men in building the pipe line and regular trucks of the company took men to and from their work. He stated however, that in his opinion this was no benefit to the Pipe Line Company, but was a benefit only to the men who rode in the trucks. He admitted that these roads would benefit the *owners* of the Pipe Line Company, but not the Pipe Line Company (Tr. pp. 73 to 84).

R. A. McGrew, vice-president of the petitioner, testified that in addition to the two lines of eight inch pipe on the right of way, that during the year 1922, two additional lines of eight inch pipe were laid, that the cost of hauling pipe might be in excess of one thousand dollars per mile, but that the general average is about four hundred dollars per mile; he stated that the company has a fleet of trucks which are used in this territory and gave as his opinion that a good road does not benefit the property adjacent to same, but only benefits the owners of the property (Tr. pp. 87 to 100).

W. J. Springer testified that he is joint chief of the Fire Department of Texarkana, Arkansas and Texas; that at the request of the Pipe Line Company, he made the run from Texarkana to their pumping station at Mandeville in about fifteen minutes and that the property was saved from burning.

He further stated that the fire equipment weighs about seven and one half tons and that without the good road, he could not have made the run as the equipment would be torn up or some of the firemen killed in going over ordinary county roads (Tr. pp. 100 to 104).

F. L. Stein the superintendent of the Texas Pipe Line Company, a witness at the request of petitioner, testified that he knows nothing about the area or roads under consideration. He further stated that he did not think good roads would help a telephone line, pipe line, iron foundry or any other kind of business. He finally admitted that it might reduce the cost

of hauling somewhat, if the pipe could be hauled over a good road (Tr. pp. 104 to 107).

C. H. Black, tax commissioner of the Pipe Line Company, stated that he made the returns for the company to the Arkansas Taxes Commission for the years 1920 to 1922 inclusive, that during that time, Mr. Hilford was superintendent in charge of the pipe line property; that Mr. Hilford is now dead, but while acting as superintendent, he had an office in Texarkana and there was a direct private wire telephone connection from Hilford's office to the home office in Kansas.

H. G. Sanderson testified: I am the collector and tollkeeper for the bridge across Red River near Index and have held such position since September, 1923. You must go over the good roads in Miller County to reach said bridge. During the years 1923 and 1924 the pipe line company used trucks and hauled a great number of men over the roads and across the bridge; also pipe. During the last seventeen days of October, 1923, they paid by check $173.45 in tolls for trucks and teams that crossed the bridge. Autos are charged 50c, light trucks 75c, and heavy trucks $1.00. They also had a number of two and four mule wagon teams. The trucks carried pipe, tools and other materials. Also they had trucks that hauled men out to work. One truck hauled white men and made two or three trips every day. The trucks could not get to the bridge without going over the good roads. In addition to the money paid me set forth above, by check, for the pipe line company, additional amounts were paid me in cash.

This work on the pipe line went on from the first of September, 1923, until the latter part of 1924. The entire fall of 1923 and all of 1924. The work was digging up and distributing pipe, digging ditches, putting in new pipe, joining it up and painting it.

I have had considerable experience in farming and helped build good roads in Little River County. It is an advantage to have a good road over which men and materials may be transported. It is a whole lot cheaper to haul over a good road, than over the ordinary dirt road. The loads the Pipe Line Company hauled could not have been brought at all over common country roads. They hauled pipe out on trucks and unloaded by the side of the road and then reloaded on wagons and hauled it out on the line. The trucks hauled from Mandeville and Paups Spur a distance of about 7½ miles. The amount paid me for tolls by the Pipe Line Company in October would probably be over an average of the amount paid for the other months of 1923 and 1924. In my opinion by means of the good roads the cost of hauling the pipe was cut in half. The Pipe Line Company hauled pipe across the bridge both ways. They brought the old pipe from Little River County into Miller County, and hauled new pipe from the railroad at Mandeville and Paups Spur across the bridge into Little River County.

From my place on the bridge I could see a mile and one-half down the highway and I know the pipe were hauled out on trucks and unloaded by the good road, then it was re-loaded on wagons and hauled along the pipe line right of way. They would haul

four or five joints of pipe on a wagon and twelve to fifteen joints on a truck. The road crossing the bridge from Ogden into Little River County is a dirt road. In winter it gets nearly impassable. It was cheaper to haul from Paups Spur over the good road and cross the bridge than to haul the pipe a shorter distance from Ogden over the dirt road. Regardless of the reason, I know the Pipe Line Company hauled the new pipe from Mandeville over the good road and over the bridge into Little River County and picked up the old pipe and hauled back into Miller County going toward Mandeville with it (Transcript pages 119 to 128).

D. B. Owens testified: I worked for the pipe line company about three months during the summer of 1921, acting as time keeper for them. They were putting down about two miles of pipe in a loop from Ogden across Red River and were working eighty to ninety men. Mr. Hillford was superintendent of the job. These men went to their work principally in auto trucks, coming from Texarkana ten or fifteen miles over the hard surface road. Ice and supplies were hauled out in trucks over said road and pipe and river clamps put around the pipe were hauled out from Paups Spur over the road. Enough pipe was hauled to put down two miles. Hauling was done mostly by trucks. It was unloaded along the good road and distributed with wagons and teams. It was too rough for trucks to go in the woods and the ground was too soft. On the hard surface road, the trucks carry ten or fifteen joints, on the dirt road wagons were used, after the pipe was unloaded

from the trucks and they carried three or four joints. Work was done on both sides of the river. If there had been no good roads to haul over, I think the pipe would have been unloaded at a switch on the Kansas City Southern Railroad. J. B. Hillford was in complete charge of everything for the Pipe Line Company (Transcript pages 128, to 136).

C. S. Christian who during 1927 was appointed State Highway Engineer of Arkansas testified: I have been a resident of Texarkana for fourteen years, am the engineer for the Miller Levee District, and was engineer in charge of building the good roads in Miller County. He identified the map introduced in evidence and the location of the pipe lines and good roads shown thereon. The way the roads and pipe line run, you can go on a good road to within less than two miles of any part of the pipe line. Before the roads were built there were no public roads in the bottoms between Paups Spur and Index, and one could scarcely go through there on horseback. The public roads were opened up when the hard surface roads were built. Prior to that time on the public roads the bridges were in such condition that autoes or trucks could not have been used, even in dry seasons the dirt roads would have been cut up by heavy hauling until they soon became impassable. It is a decided advantage to haul over a hard surface road, the load limit can be increased and much higher speed maintained thus reducing the cost of hauling. Before these roads were built, at certain seasons of the year, it was impossible to haul between Paups Spur and Index.

At any time before the roads were built, 2500 pounds would have been a good load for a farm wagon. In laying the pipe lines trenches were cut through the good roads and pipe laid and then the trenches were filled up (Transcript pages 137 to 150).

L. F. French testified: I have been for more than twenty years in the contracting business doing levee, road and hauling. During the years 1923 and 1924 I hired my teams by the day to the Standard Pipe Line Company. I hauled for them between 45 and 60 days in Miller County, crossing the river and hauling for them in Little River and Sevier Counties. I used mules and wagons and hauled some pipe from Mandeville and from Paup Spur over the good road to the pipe line right of way and hauled some from the storage piles on the good road along the pipe line right of way.

It was about three and one half or four miles from Paup Spur to the distributing point on the good road where the pipe was unloaded. This being the point where the pipe line crosses the good road. On the gravel roads the teams can haul all the wagons will hold. It is simply a matter of the capacity of your wagon. After leaving the hard surface road, I think I pulled six to eight joints. I do not think the company distributed any pipe on its right of way with trucks, but hauled them all on the good roads and placed them in piles where the good road crosses the pipe line right of way. It is a great advantage in hauling heavy materials such as pipe, to have a good road over which you may haul. I did not haul any

pipe from the Kansas City Southern Railroad in Miller County.

There is no good road after you cross the bridge between the bridge and Ogden. In hauling from Paup Spur there was no way to get out to the pipe line except over the good road. In hauling with trucks the Pipe Line Company did not take the trucks off the gravel road. Along the pipe line right of way at times it was such bad hauling that all wagons would have to be unloaded and the pipe snaked or skidded along the right of way one at a time. One single bad place would keep you from hauling a load across same (Transcript pages 151 to 157).

W. J. Paulk testified: I have been employed as an accountant for the Miller County Highway and Bridge District for several years. In the bottoms cleared land is assessed at $10.00 per acre, and the average wild land $4.50 per acre for general taxation. The assessment of benefits for road purposes in the entire road district is $6,687,178.00. The assessment of benefits for road purposes in the City of Texarkana is $2,561,000.00. Outside the City of Texarkana such assessment for road purposes is $3,664,445.00. The total acreage of land in the district is 136,322 acres. The average assessment of benefits for road purposes per acre against the land outside the city is $26.88 per acre.

On the assessment of benefits there was levied for road taxes the following percentage:

1916	6-2/3 mills
1917	6-2/3 mills
1918	7 mills
1919	7 mills
1920	10 mills
1921	10 mills
1922	10 mills
1923	10 mills
1924	8.5 mills

The benefits assessed against any tract of land are multiplied by the number of mills for the year levied, and the result is the amount of taxes that must be paid for road purposes by that land for said year. The assessment for the purpose of general taxation is not considered and has no bearing on the collection of taxes for road purposes, the road taxes being levied on a benefit basis (Transcript, pages 158 to 159).

E. H. Peyton testified: I operate a farm at Paup Spur and have been staying on the farm practically all of the time since 1917. The good roads had not been completed when I moved there. In the hills there were passable roads, but if one went into the Red River bottoms, after a rain they were impassable. An auto could not be used at all. It took four mules to pull a two mule load. There was no road of any kind between Paup Spur and the bridge at Index. One had to just wander around through the woods to get there.

During the year 1921, the Pipe Line Company unloaded a large quantity of pipe at Paup Spur, I

understand about twenty-one cars. Trucks hauled the greater part of this out on the gravel road and placed it in dumps and from there it was distributed on the pipe line right of way by teams. My teams hauled during that time for the Pipe Line Company. After you left the good road there was no road through the woods. It was very wet and bad at times and two or three pipe were all we could haul at a load after leaving the good road. On the good road, it was not a question of what your teams could haul as they could pull all the wagons would hold up. I have seen trucks go out from Paup Spur over the good road with fifteen to twenty pipe. In hauling with wagons from the dumps where the pipe was put along the good road, it would be so bad on the pipe line right of way that we would unload our wagons and hitch a pair of mules to just one pipe and snake it along the right of way.

My farm will not raise any bigger crops because of the good roads, the advantage from a good road is making a place accessible. The pipe line company has been benefited as you can go close to their line at almost every point on a good road and they can haul their materials and men over the good roads to work on and repair the line. They hauled men in trucks from Texarkana and many of the men came to work in their own cars. During the year 1921, at one time they worked about one hundred fifty men. Work was commenced again on the pipe line in the year 1923 and finished during the year 1924, and a quantity of pipe was unloaded at Paup Spur. The pipe were taken out over the good road from Paup

Spur in trucks. They hauled from fifteen to twenty pipe at a load. The trucks could not leave the good road. They did not work as many men as in 1921, working this time perhaps seventy-five to one hundred men. I would see the trucks coming by my place to work with 25 to 30 men on a truck. The pumping station is right along the good road and the men at work there came out in cars and trucks from Texarkana.

While this work was going on, old pipe that was taken up in Miller County and from across the river was brought in to Paup Spur over the good road by trucks. It was hauled by teams to the good road, then the trucks were loaded and brought it in. There were two distributing points or dumps on the good road, one on Dr. Collins' farm and the other near the bridge at Red River (Transcript, pp. 160 to 165).

L. C. Adams testified: I live at Texarkana and I am vice-president of the road district. I own a farm in Red River bottoms. There was no road from Paup Spur to Index so one could go into Little River County before the good roads were built. In dry weather one could haul in the bottoms, but when it was wet, I had to use four and sometimes six mules to haul a two mule load. We shipped our cotton from Homan because we could not haul it to Texarkana. Now I can bring in 16 to 20 bales over the good roads with a four mule team. In the bottoms the land is black buckshot, so it is impassable in wet weather.

Within the last two weeks, since the fire at the pumping station at Mandeville, a large number of workmen have been coming out over the good roads in trucks and

cars. I formerly ran a livery business and have had considerable experience in hauling. I think the pipe line company has been greatly benefited by the good roads. They can haul four times as much over the good roads as over the dirt roads. The only way anything can be benefited by a good road is by the traffic over same. It does not make the farm raise any more. The benefit of the good roads is from accessibility.

Some of the cleared lands are now worth $100.00 per acre, and some of the woodland, $40.00 per acre. The increase in value has come from a variety of circumstances. The first advance was because of the levee being built, then the land advanced because a drainage ditch was being dug, then from the highway being built and being close to Texarkana; also the advance in the price of cotton made land go up (Transcript, pages 165 to 169).

The two acts creating the district and act creating Red River Bridge District were introduced in evidence. Under Section 7 of the 1915 Acts, parties aggrieved by the assessment made on their land, must appeal in thirty days from the board of assessors to the commissioners and if still aggrieved then appeal in thirty days to the county court of Miller County (Transcript, pages 174 to 206).

Under the Act of 1917, Section 6, the assessment of benefits heretofore made was ratified and confirmed, and from any assessment made thereafter, a party aggrieved must appeal to the commissioners within thirty days (Transcript pages 187 to 189).

Under Act 83 of the Acts of General Assembly of Arkansas, which became a law February 14, 1925, Sec-

tion 7 thereof, the legislature ascertained and declared that the assessment of benefits in this road district is just and equitable and ratified and confirmed such assessment of benefits which shall stand until a new assessment shall be made:

> "Section 7. It is ascertained and hereby declared that the assessment of benefits of said district is just, equitable and proportionate, and the same is hereby ratified and confirmed and shall stand as the assessment of benefits of said district until a new assessment is made in the manner provided by the said Act No. 15 of 1917.
>
> Act 83, page 249 of Acts of Arkansas for the year 1925."

On being recalled, *R. A. McGrew*, vice-president of the pipe line company testified: That his estimate of the cost of reproduction of the pipe line is $11,500.00 per mile for one string of 8-inch pipe; that it would cost four times that or $46,000.00 per mile to replace the four lines of pipe now laid along the right of way owned by the pipe line company (Transcript, pages 206-207).

Louis Josephs, secretary of the district on being recalled, testified: That the total assessment of benefits against the pipe line company is $60,000.00. That, as shown by W. J. Paulk's testimony, 1%, 10 mills, has only been levied for long years, it being less for the other years; that if the total of 1% had been or should be levied for the entire period of the bond issue for twenty years, the total taxes to be paid by the pipe line company would be $12,000.00, but the present levy, which will continue, is only 8-2/3 mills a year (Transcript, page 208).

The map filed as an exhibit has attached a memorandum furnished by the pipe line company showing the assessed benefits for the property in the district, the number of miles of right of way owned by the pipe line company and the number of miles of pipe occupying said right of way.

BRIEF.

Respondents motion to dismiss could have been sustained without a trial of this cause on its merits.

Under the Original Act of 1915, Section 7, any property owner aggrieved by the assessment of benefits could complain to the board of assessors to obtain a correction of any assessment, an appeal was granted to be taken within thirty days by the property owner from the action of the assessors to the commissioners of the road district and an appeal then allowed from the decision of the commissioners to the county court, such appeal to be taken within thirty days.

Under the Amendatory Act of 1917, Section 6. In case of reassessment of benefits, the board of assessors should meet and hear the complaints of property owners and increase or decrease their assessment in accordance with the benefits to be received. Any property owner aggrieved by the action of the assessors could appeal to the commissioners, such appeal to be taken within thirty days.

Although under the last act no specific authority to appeal from the assessment of road commissioners was granted, yet such authority is granted under the Constitution and laws of the State of Arkansas. In a matter involving the adjustment of the proportion of an indebtedness to be assumed by two counties, the commission appointed by the Legislature made the decision and though no right of appeal was specifically

granted, the Arkansas court held such right of appeal to exist under the Constitution. *Phillips County* v. *Lee County,* 34 Ark., page 243. Such has been the consistent holding of the Arkansas courts, even though the appeal is from a special proceeding authorized by the Legislature. See *Missouri Pacific Railroad Co.* v. *Conway County Bridge Dist.*, 134 Ark., page 297, and cases there cited.

The pipe line company, under the above acts, had a complete remedy meeting all requirements of the due process clause of the Fourteenth Amendment of the U. S. Constitution, and having failed to pursue the remedy provided, cannot now, after a delay of more than seven years bring this action in equity to obtain a review and avoidance of the assessment of benefits.

In an Arkansas case, after citing from the *State* v. *Railroad Tax Cases,* 92 U. S. p. 609, to the effect that where a party aggrieved has a judicial tribunal before which he may appear for the correction of such grievance, he must pursue such remedy, the court held:

> "Due process of law," said Judge Field in *Railroad Tax Cases,* 13 Fed. Rep. 752, "is deemed to be pursued, when after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity at a time and place to be designated to be heard respecting the correctness of the assessment and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient if the time and place of hearing be designated by statute." This is the established rule. Cooley on Tax, (2nd Ed.) 364-5, and cases cited there and *supra.*

> And where an adequate remedy in the nature of an appeal is provided, as is done in our statute, the better opinion is that a mere error of judgment on the part of the board or a mistake in their conclusion, though arrived at without evidence where evidence is required, is not available in a collateral issue. The tax payer must pursue the remedy provided for his relief or abide by the finding of the board.

citing various cases from Arkansas and other states to support its holding; also stating:

> "Great mischief would follow in permitting the taxpayer to select arbitrarily his own time and tribunal to test the correctness of an assessment."
> *Board of Equalization Cases*, 49 Ark. p. 533.

In a later case the court reaffirmed the law as laid down above, holding:

> "The jurisdiction to fix this valuation is by legislation ordinarily placed with some officer or board; and boards or courts of revision are sometimes established. But the entire proceedings are statutory, and the statutory remedies provided to a party aggrieved by an over-valuation made within the jurisdiction of the particular officer or board must be pursued. As is said in the case of *Stanley* v. *Supervisors of Albany*, 121 U. S. 535: 'A party who feels himself aggrieved by overvaluation of his property for purposes of taxation and does not resort to the tribunal created by the state for correction of errors in assessment cannot maintain an action at law to recover the excess of taxes paid beyond what should have been levied on a just valuation.'"
> *Clay County* v. *Brown Lumber Co.*, 90 Ark. p. 417.

In a late case which has recently been affirmed by the U. S. Supreme Court, the Arkansas Supreme Court held:

> "The third and fourth grounds of attack may be considered together. The court sustained a demurrer to that portion of the complaint which attacked the assessments on the grounds that they were made under a mistake of fact, and that there was a discrimination in favor of, or against, certain property owners. This action of the court must be affirmed, for there must come a time when such questions are foreclosed. It was upon the faith of these assessments that the district incurred obligations and issued negotiable bonds with which to pay them, and these bonds are owned by the investing public through the United States. The act expressly names the time when these questions are foreclosed, and that time is ten days after the completion of the hearing on the assessments by the commissioners, except as against property owners who, within that time, have applied to the chancery court for relief.
>
> "We have in many cases upheld this limitation upon the time within which property owners may complain. The recent case of *Pierce* v. *Drainage District No.* 17, 155 Ark. 89, collects a number of them. This question was very thoroughly considered by us in the recent case of *Road Improvement Dists. Nos.* 1, 2 *and* 3 v. *Crary*, 151 Ark. 484, in which a very similar attack was made on an assessment of benefits. There the assessment had been made according to the zone system, which was said to be arbitrary and unreasonable, but we answered that and other objections to the assessment as follows: 'We have often decided that the method provided in the statute for attacking the validity of the assessment of benefits is exclusive, and that it must be pursued within the time prescribed by the statute. In other words, it

has been settled by repeated decisions of this court that a collateral attack cannot be made upon the assessment of benefits unless void on the face of the proceedings. *Reitzammer* v. *Desha Road Imp. Dist.*, 139 Ark. 168; *Summers* v. *Conway & Damascus Road Imp. Dist.*, 139 Ark. 277; *Nettles* v. *Hazelwood Road Imp. Dist.*, 144 Ark. 632; *Sikes & Douglas*, 147 Ark. 469."

House v. *Road Improvement Dist. No.* 2, 158 Ark. p. 344.

The decisions of the U. S. Supreme Court on this question are thoroughly in accord with the citations heretofore given from the Arkansas Courts.

An assessment for park purposes was made by the supervisors sitting as a board of equalization of the City of Denver, due notice having been given to the land owners to appear and except to any assessment. The Colorado courts had held that the statute in question gave the interested parties full authority to be heard, and having failed to appear, they could not thereafter raise the question as to whether their property had been benefited in the amounts found by the board of equalization. The U. S. Supreme Court held itself bound by the decision of the Colorado court as to the meaning of the said statute and held that the due process clause of the Constitution had been complied with.

"The full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself therefore, is clear of all constitutional faults."

Plaintiffs in error did not avail themselves of the privilege of a hearing, as provided by this sec-

> tion, but after the assessing ordinance had been passed, began this proceeding in the district court to test the constitutionality of the law. As we have said, the question as to what should be a proper construction of the charter provision was not for our decision; that matter was within the sole authority of the state court, and was disposed of, as the Supreme Court of Colorado held, by the former cases reported in 33 Colo. and by our decision based upon that construction in *Londoner* v. *Denver*, 210 U. S. 373, 52 L. Ed. 1103, 28 Sup. Ct. Rep. 708. As the plaintiffs in error had an opportunity to be heard before the board duly constituted by par. 300, they cannot be heard to complain now. It follows that the judgment of the Supreme Court of Colorado must be affirmed.
>
> *Fawnwood* v. *City & County of Denver*, 252 U. S. p. 12.

The above case was referred to and sustained in a later case going up from the State of Colorado where it was held that the property owners who failed to appear before a tax commission to object to a tentative *ad valorem* basis for assessment for public improvements cannot complain before the courts of the adoption of such basis on the ground of its unconstitutionality. *Millheim* v. *Moffatt Tunnel Improvement District*, 262 U. S. p. 712.

In a later case involving the identical question here raised, the U. S. Supreme Court held itself bound by the construction of the state court of a state statute in reference to the remedies of tax payers for relief from an excessive assessment, and further held that the failure to seek relief from an alleged unequal tax from the proper board cannot be excused because

no appeal to a judicial tribunal was provided in case of the rejection by said board of the party's complaint; and the Supreme Court further held that although it was alleged that the time for hearing complaints was inadequate, yet the court will not assume that the proper relief would not have been granted; and finally holding that a tax payer must exhaust his available legal remedies before the administrative board before resorting to courts to enjoin the enforcement of an unequal tax.

In said case as stated, in the opinion, the fact was found that the banks as assessed were compelled to pay upon valuation grossly in excess of that put upon other property in the county, but since they had not pursued the remedy provided under the statute, no relief could be afforded.

> "Plaintiff not having availed itself of the administrative remedies afforded by the statutes, as construed by the state court, it results that the question whether the tax is vulnerable to the challenge in respect of its validity upon any or all of the grounds set forth, is one which we are not called upon to consider. The judgment of the district court is accordingly affirmed."
>
> *First National Bank* v. *Board of County Commissioners*, 264 U. S. p. 456.

In the last case on this subject, which as yet has not appeared in book form, suit was brought to enjoin as unconstitutional the collection by the State of New York of the annual franchise tax paid upon net income. The New York statute provided that a dissatisfied tax payer might within one year apply to the tax

commission for a revision and reassessment according to the law and facts. The plaintiff did not apply to the commission, but within the year brought this suit; referring to the case next above cited, the U. S. Supreme Court held:

> "A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax, cannot thereafter be heard by a judicial tribunal to assert its invalidity (citing cases) * * *
>
> The company, however, made no application to the commission for a revision of the tax; it submitted no evidence to the commission as to any of the matters on which it now relies, either as to the inclusion of profits derived from the munitions business or otherwise; and it did not request the commission to resettle the tax on the ground of any error or invalidity, in matter either of fact or law.
>
> Under these circumstances we think that the company, having failed to avail itself of the administrative remedy provided by the statute for the correction of the tax was not entitled to maintain a bill in equity for the purpose of enjoining its collection."
>
> *Gorham Manufacturing Co.* v. *State Tax Commission of New York*, 266 U. S. p. 265.

The various reasons set forth in the petition for writ of certiorari seem to fall under the following heads:

Petitioner claims that the right of way and pipe lines are personal property.

The decisions of the Arkansas Supreme Court on this point are binding on this court and such decisions have uniformly held that a right of way and the prop-

erty thereon is real estate in Arkansas. *Ft. Smith Light & Traction Co.* v. *McDonough,* 119 Ark. p. 258; *Mo. Pacific Railway Co.* v. *Conway Bridge Dist.* 142 Ark. p. 11.

A telegraph line erected on the right of way of a railroad company, under a twenty-five year contract, was held to be a permanent easement and real estate and the act of the Legislature making such telegraph line subject to road taxes was upheld. *Western Union Telegraph Co.* v. *Road Dist. No.* 1, 144 Ark. page 479.

In a case carried by the present petitioner to the Arkansas Supreme Court in an endeavor to avoid the payment of local assessments, it was decided that the very right of way and pipe line at issue in this cause is real estate and subject to local assessment as real property. See *Standard Pipe Line Co. Inc.* v. *Index-Sulphur Drainage District,* decided by the Supreme Court of Arkansas, March 28th, 1927, now in print in the advance sheets.

Petitioner claims that its right of way and pipe lines are not sufficiently described so they may be identified for tax purposes.

Petitioner paid the assessments for road purposes for three years and then brought an action to be allowed to pay county and state taxes on its right of way and pipe line without paying such road taxes.

Petitioner had certain correspondence with the tax collector's office about its delinquent road taxes before paying same and after corresponding, did pay such taxes, so it appears that the description was ample to

identify the property and petitioner knew what property was and is subject to read taxes.

To prevent the opportunity of any property escaping taxation because of a mis-description or clerical misprision under the original act of 1915, Section 131 Tr. p. 180, it was provided that this law shall be liberally construed to give the assessment and tax lists the effect of a first mortgage and lien against the property. It was further held: "Provided that no informality or irregularity in holding of any meeting or the assessment of the land, or the names of the owners, or the number of acres, shall be a valid defense to an action for taxes" (Tr. p. 180).

"Also under Section 8, (Tr. 176), it prescribed that railroads, rights of way, pipe lines, telegraph and telephone lines and all other franchises connected with the realty shall be assessed according to the betterments and increase in value in like manner as herein prescribed for real estate, except said assessment shall be made per mile and no error in the name and residence of the owner or *the description thereof* shall invalidate said assessment if sufficient description of the property sought to be taxed is given to ascertain where it is situated."

In order that any mis-description or clerical misprision on the assessment roll might be corrected, Section 15 of the original act of 1915 (Tr. 181), and Section 14 of the amendatory act of 1917 (Tr. 194), are the same and as follows:

> "In the event the description of any lot, tract or parcel of property upon the list of the assess-

ment hereinbefore provided to be made, shall for any reason be uncertain, indefinite or insufficient, then in any suit brought to enforce the payment of any assessment, the court shall have the power to correct such description and enforce the collection of any assessment due thereon, having due regard for the rights of any parties who may have intervened."

Petitioner claims that being a nonresident notice of publication of the assessment of benefits does not apply to petitioner.

The testimony shows conclusively that notice of the filing of the assessment roll was given by publication as required by law granting the owners at least thirty days within which to appear and except to their assessment. Such notice complied fully with the due process clause of the U. S. Constitution and it was not necessary that actual notice be given to each separate land owner in the district. According to the evidence, the road was built immediately adjoining the pumping station and general headquarters of the pipe line company, and they of necessity used the road, saw same and knew of its construction. The testimony also shows that one Mr. Hillford, the superintendent in charge of the company's affairs in Miller County, Arkansas, who was in daily communication with the home office through a private telegraph wire, knew about the assessment for road purposes and discussed same with George Conway, one of the assessors who had an office adjoining that of Hillford. The assessment being *in rem* against the property itself notice thereof by publication fully complied with the constitutional requirements.

Four weeks' notice was held to be adequate time to afford due process of law where land was sold for levee taxes, and referring to lands owned by non-residents, the U. S. Supreme Court held:

> "It should be kept in mind that the laws of a state come under the prohibition of the 14th Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises."
>
> *Ballard* v. *Hunter*, 204 U. S. p. 262.

The time limit set by the statute, within which objections to an assessment for road purposes, could be made, was upheld by the Arkansas Supreme Court in *House* v. *Road Improvement District No.* 2, 158 Ark., page 344. On appeal the U. S. Supreme Court held that the statute allowed twenty-eight days from the first publication of the notice within which the petitioner could have objected to the assessment, holding as follows:

> "Accepting the statute as construed by state courts the suggested objection to its validity appears to us wholly wanting in merit."
>
> *House* v. *Improvement District*, 266 U. S. p. 177.

As in the Bullard case above cited, House was a non-resident of the state (see also *Larisny Land Co.* v. *Hoffman*, 268 U. S. p. 279).

Petitioner claims that the assessment of benefits is so arbitrary and discriminatory as to be invalid and further claims that the ratification of the assessment of benefits is invalid.

The ratification and confirmation of the assessment of benefits by Acts of 1917 and 1925 was a legislative assessment, and is binding upon the property owner unless absolutely arbitrary, unreasonable and absurd.

> "It is next insisted that the Legislature had no power to validate and confirm the assessments which had theretofore been made by the commissioners. Unless the assessment was arbitrary, the Legislature had the power to confirm and validate it. The Legislature had the power in the first instance to have levied the assessment subject only to the right of the land owner to have an arbitrary abuse of that power reviewed by the courts, and it can therefore adopt as correct the assessment made by the commissioners as a reassessment by the Legislature. *Coffman* v. *St. Francis Drainage District*, 83 Ark. 54 and *Davies* v. *Chicot County Drainage Dist.*, 112 Ark. 357."
>
> *Gibson* v. *Spikes*, 143 Ark. p. 274.

> "An affirmance of the judgment in this case might be rested entirely on the confirmation of the assessments by the statute cited above. There is no reason shown why the statute is not applicable, for we have decided that, even during the pendency of litigation, a statute may be enacted ratifying and confirming assessments. *Sudberry* v. *Graves*, 83 Ark. 344; *Tims* v. *Mack*, 147 Ark. 112; *Gibson* v. *Spikes*, 143 Ark. 270; *Burr* v. *Drainage District*,

145 Ark. 55; *Payne* v. *Road District*, 149 Ark. 491."

Kansas City Southern Railroad Co. v. *Road District No. 3*, 156 Ark. p. 118.

In which last case the U. S. Supreme Court in affirming the decision of the state court held as follows:

"The special confirmatory act was recognized by the supreme court of the state as a legislative determination of the lands which will be benefited, and of the proportions in which they will share in the benefits. It therefore must be treated here as an admissible legislative assessment of benefits so far as the state constitution is concerned."

Kansas City S. R. Co. v. *Road Improvement Dist. No. 3*, decided by the U. S. Supreme Court, December 15th, 1924.

Among other cases cited as supporting their holding that the finding of the Legislature as to benefits is conclusive the U. S. Courts quote approvingly from *Spencer* v. *Merchant*, 125 U. S. 345.

This leading case on this subject has settled for all time that a legislative finding of benefits is conclusive on the courts, state and Federal and does not violate the 14th Amendment to the Constitution, unless such legislative determination is palpably arbitrary and therefore a plain abuse of power.

Of the total benefits assessed for road purposes, $6,687,178.00; $60,000.00 in benefits was assessed against the pipe line company, about 9/10 of 1% of the total assessment of benefits.

On said amount during the twenty year period through which the bonds run if the maximum of ten mills per year had been levied, $600.00 per year, $12,-

000.00 total would be collected in road taxes. However, as shown by the testimony, the maximum has been collected for only four years and the average over the twenty years will probably be less than $500.00 per year to be paid by the pipe line company. We therefore feel that the court erred in finding as a fact that such levy of an assessment of benefits of $5,000.00 per mile is palpably arbitrary.

The method in Arkansas of determining benefits received by property in improvement districts.

We quote below from a few of the Arkansas decisions showing that the courts have never attempted to substitute their opinion and judgment for that of the Legislature or of the assessors appointed to distribute benefits. The Arkansas courts following the rule laid down by various decisions of the U. S. Supreme Court have consistently refused to hold said assessments invalid unless of such a nature as to be so palpably arbitrary as to be shocking to one's ideas of right and justice.

> "The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so; and may settle both questions for itself, and when it does so, its action is necessarily conclusive and beyond review. * * * No hearing would open the discretion of the Legislature, or be of any avail to review or change it. * * * The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers."
>
> *St. Louis & S. W. Ry. Co.* v. *Grayson*, 72 Ark. 127.

The St. Louis Southwestern Railway Company claimed that its railroad track running through Red River Levee District No. 1 had not been benefited by the building of the levee, and proved by its witnesses that the track was above overflow. The court found from the testimony of witnesses who professed to know, that the building of the levee was calculated to result in, and did result in benefit to the track. The court further found:

> "It is not necessary that it should receive absolute protection from overflow, or that it should have been entirely without protection and subject to inundation before the levee was built. Whether it was benefited to an extent equal to that of other property in the district, we do not consider it necessary to determine. That was a matter largely for legislative determination in fixing the boundaries of the district and providing for the method of assessment of taxes. That was a matter for legislative inquiry and determination, and that the courts must respect such determination, it is settled in so far as it can be done, by a decision of this court in the case of *Railway Company* v. *Grayson*, 72 Ark. 119, and that decision is in accordance with the authorities generally."

After finding that the assessment of the property shall be according to the value as appraised for state and county taxation, the court found that such method of estimating the benefits is not arbitrary or unreasonable, and that the Legislature might assume that benefits would accrue in proportion to the assessed value of the property (*St. Louis S. W. Ry. Co.* v. *Board of Directors*, 81 Ark. 566).

In a case attacking the validity of assessments in an improvement district, after citing the cases hereto-

fore quoted, this court quoted approvingly from "Cooley on Taxation."

> "It has been repeatedly decided that the legislative act of assessing districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying a court that no special and peculiar benefits are received."
>
> *Board of Improvement District* v. *Offenhauser*, 84 Ark. 268.

> "But such fraud or demonstrable mistake can occur only when the assessments are levied on lands entirely regardless of the benefits and by reason of a manifest prejudice against the owner, or in a total and reckless disregard of his rights. If the property is benefited to any extent by the improvement, then it can be included in the district, and the mere fact that the benefit assessed against it was exorbitant or excessive, would not invalidate the assessments thereof.
>
> Nor will it be sufficient to show by a preponderance of the evidence only that the property was not benefited by the improvement. If it appears from any substantial testimony that the property receives any benefit from the improvement, then the assessment thereof made by the board cannot be invalidated by the court.
>
> In the case at bar, while the chancellor found that the property of the defendants was not benefited by the improvement, and his finding is sustained by a preponderance of the evidence, nevertheless there was substantial testimony adduced upon the part of the plaintiff showing that the property received actual benefits from improved sanitation and it could be connected with the sewer system so as to successfully drain the sewage from this property and thereby receive benefits. Under such circumstances, the assessment made by them cannot be invalidated or set aside in this proceeding."
>
> *Board of Improvement* v. *Pollard*, 95 Ark. 552.

The City of Clarendon assessed benefits against the railroad track of the St. Louis Southwestern Railway Company for an improvement district for laying water mains throughout the city. The railway company resisted, claiming that the assessment against their track was arbitrary and unreasonable, which contention was upheld by the chancellor. In reversing the chancellor and upholding the assessment, this court held:

> "When the assessment of the benefits arising from and the proportionate cost of a local improvement has been made upon the property specifically benefited thereby, by the proper officials in the manner prescribed by law, it devolves upon the party attacking same to show that the amount of these assessments is excessive or unequal. It has been held that the amount of the benefits which such officials have found and determined to accrue to each lot and parcel of property in a district by reason of the improvement, will be presumed to be correct and just and the courts will not disturb same until the contrary has been shown by the evidence. Such evidence must consist not *merely of opinions that the assessments are excessive*, but of facts which will overturn the *prima facie* fairness and equality of the assessment established by the returns of the assessors."
>
> *Improvement District No. . . .* v. *St. Louis, S. W. Ry. Co.*, 99 Ark. 521.

The Legislature created Levee District No. 2 in Jackson County, Arkansas, and included within the district part of the railroad track and right of way of the St. Louis, Iron Mountain & Southern Ry. Co. The railway company refused to pay taxes, claiming not only that it received no benefit, but setting forth the fact that it was actually damaged by the building of

the levee, and introduced the testimony of its engineers as experts to show such damage. This court quoted with approval the excerpt from "Cooley on Taxation" that we have heretofore set forth at length, and in referring to the contention of plaintiff that it would not be benefited but damaged by the construction of the proposed levee this court held:

> "After the Legislature has determined that a certain area which it has organized into an improvement district will be benefited by the improvement, it is not a question for the courts to determine, upon a preponderance of the evidence, as to whether or not the legislative judgment has been properly exercised. It is only an arbitrary and manifest abuse of power of the Legislature in creating improvement districts that will be reviewed by the courts."
>
> *St. Louis Iron Mountain and Sou. Ry. Co.* v. *Board of Directors of Levee District*, 103 Ark. 134.

The St. Louis & San Francisco R. R. Company refused to pay assessments for the Ft. Smith & Van Buren Bridge District, claiming that the bridge was not a benefit, but an actual detriment to its property, in that traffic would be diverted from the railroad and bridge of the railway company. Although it was shown that the earnings in freight traffic had decreased since the bridge was put into operation, yet the court held this might be accounted for because of poor crops; that future benefits are, to a certain extent speculative, and that the estimated growth of population, because of the building of the bridge, might reasonably be expected to increase the traffic of the railroad, even with the competition, as it is impossible to find an exact

standard for benefits to accrue in the future, and since there was some testimony showing that benefits had been received, the assessment was upheld, the court holding:

> "The assessment of future benefits is largely a matter of estimate, and, to some extent, speculative. As was stated by Justice Holmes in the case of *Louisville & Nashville, Ry. Co.* v. *Barber Asphalt Co.*, 197 U. S. 430, 'the amount of benefit which an improvement will confer upon particular land, and indeed, whether it is a benefit at all, is a matter of forecast and estimate, and on the question of benefits, the present use is simply a prognostication and plea of prophecy.'"
>
> "We must depend largely upon the opinions of men of sound judgment and reasonable information on the subject, to determine what the future benefits will probably be. If it were necessary to find an exact standard, a measure of benefits in advance would be impossible. That view of the matter would necessarily lead to the conclusion that benefits must be enjoyed before there can be an assessment to pay for the improvement, which would be a contradiction in itself.
>
> The question of the legal sufficiency of the evidence is all that we need to pass upon, and we are of the opinion that there is competent testimony of a substantial nature sufficient to base the finding upon as to the amount of benefits fixed."
>
> *St. Louis & S. F. Ry. Co.* v. *Bridge Dist.*, 113 Ark. 496.

In an improvement district case, going up from Texarkana, after citing numerous cases heretofore quoted, the court held:

> "We have decided in numerous cases that a legislative ascertainment that benefits from a local improvement accrue in proportion to the value

of the property benefited will be respected unless it be demonstrated to a certainty that a mistake has been made."

Board of Improvement v. *S. W. Gas & Electric Co.*, 121 Ark. page 110.

In a case involving assessments for highway purposes, where the legislative act creating the district had set forth the lands that would be benefited, it was asserted that said act is void as containing a legislative finding that certain lands will be benefited by the proposed road, whereas this is a judicial and not a legislative question. The court answered this contention as follows:

"It is always a question of fact, and in a large measure, a matter of opinion, as to what lands will be benefited by a particular improvement. Reasonable minds may, and do differ on this question, and that difference continues to exist when the question of the amount of benefits is reached. Some one must be authorized to decide these questions, for it is inconceivable that there should ever be, or could ever be, a unanimity of opinion upon a subject affording so wide a scope for difference of opinion. The Legislature has control of this subject, and it may appoint such agencies to make these findings as it sees proper to create, or it may make the findings on its own account, and when these findings have been made and have been properly declared in the recitals contained in legislative enactments the courts are bound thereby except for arbitrary or obvious and demonstrable mistakes. A number of cases have thus announced the law and what we have just said disposes of the last recited objection of the *Amici curiae*, that the question of benefits is a judicial, and not a legislative question. Indeed, it is conceded that this court

has frequently so decided, and we decline to overturn this line of cases."

Cummock v. *Alexander*, 139 Ark. 157.

In upholding an assessment of benefits for bridge purposes against a railroad, where the testimony that no benefits would be received was that only of the railroad employes, the Arkansas Supreme Court upheld said assessment using the following language:

> "No attempt was made to prove fraudulent, or capricious or arbitrary action on the part of any officials in making the assessment, the only evidence upon the subject being the opinions of four employes of the company that the improvement of the road would not benefit the railroad property, and if inequality has resulted from the application of the state law in a customary manner to a situation frequently arising in our country, it is an incidental inequality resulting from a valid classification of railroad property for taxation purposes which does not fall within the scope of the Fourteenth Amendment, which was not intended to compel the states to adopt an iron rule of equal taxation."
>
> It follows that the decree will be affirmed.
>
> *Mo. Pac. Rd. Co.* v. *Conway County Br. Dist.*, 142 Ark. p. 14.

In the case of *House* v. *Road Improvement District No.* .. in which the Arkansas Supreme Court decision has been affirmed by the United States Supreme Court, the legal points involved are almost identical with those in the present case.

The road district was formed by special act of the Legislature, which designated the territory that would be benefited by the improvement, and the commissioners appointed assessed the benefits against the

lands in the district. Mrs. House, a non-resident living in Washington, D. C., brought suit claiming that the assessments against her lands were void as being discriminatory as said lands do not receive any benefit from the roads. She also claimed just as is claimed here, that she had no actual notice of the act creating the district, of the building of the roads, or of the assessment against her land, and that the published notice giving parties aggrieved the opportunity to appear before the commissioners and object to the assessment did not give such notice as is required by due process of law.

Both of said contentions were decided in favor of the district and the court stated:

> "This language is too broad for its meaning to be mistaken. The landowner was given an opportunity, if he desired it, to appear and complain before the commissioners about his assessments, or, if he preferred, he might wait until the commissioners had passed upon the assessments and then appeal to the chancery court, and in either case he was entitled to an original *de novo* hearing. It was not necessary that he formally make himself a party to the proceedings. He was made a party by the act itself, and, unless he appeared before the commissioners and was heard by them, he waived the right to that hearing; and if, at the conclusion of the hearing by the commissioners, a hearing by the chancery court was not invoked, the assessment became final and binding."
>
> Citing *Coffman* v. *Road Improvement Dist. No. 6, Lawrence County*, 134 Ark. 411.
>
> *House* v. *Road Improvement Dist. No. 2*, 158 Ark. p. 339.

"Here the Legislature created the district and defined its boundaries. Appellant's lands were placed in the district by the action of the General

Assembly itself, which was a legislative determination that those lands would be benefited by the proposed improvement of the highways within the district; and, after doing this, the act provided that the commissioners should determine the assessment of benefits and damages against the respective tracts of land in the district, and should determine, as an administrative matter, the per cent of these betterments to be levied and collected each year; and we think the notice which the act required is sufficient to constitute due process of law."

House v. *Road Improvement Dist. No.* 2, 158 Ark. p. 343.

The Eighth United States Circuit Court of Appeals has heretofore in a case against a levee district, held that the decision of the Arkansas Legislature is not subject to change by the courts and has quoted approvingly from the Arkansas cases heretofore cited:

"There is no allegation in the bill that in determining this location, the directors acted in an arbitrary and unreasonable manner. There is no allegation that they did not employ competent engineers. If the Legislature had in the act itself located the line in the same place where the directors did locate it, and if it had in the act itself fixed the same height for the levee which the directors afterwards did (both of which things the Legislature had the undoubted right to do), it could not for a moment be contended that an allegation such as is found in the bill would require the court to enjoin the prosecution of the work thus ordered by the Legislature. Such an allegation would amount to nothing more than the opposition of the opinion of the railway company to the opinion of the Legislature."

In *Moore* v. *Board of Directors*, 98 Ark. 113, at page 117, 135 S. W. 819, at page 821, the court said:

"It will be seen from this that the court held that only an arbitrary and manifest abuse of power by the Legislature would be reviewed, and not merely mistakes of judgment. To hold otherwise would be to take away from the lawmakers the powers committed to them and to substitute the judgment of the courts, requiring the latter to review every matter alleged to have been erroneously determined by the Legislature. It is only an arbitrary determination of the lawmakers, made without just and reasonable basis, that the courts should review. We said in *Louisiana & Ark. Ry. Co.* v. *State*, 85 Ark. 12, 106 S. W. 960. 'The legislative determination should be and is conclusive, unless it is arbitrary and without any foundation in justice and reason.' Nor can the courts review merely on general allegations that the assessments are 'arbitrary, excessive, and confiscatory.' Facts must be pleaded which show that the decision of the law makers was not merely erroneous, but that it was manifestly outside of the range of the facts, so as to amount to an arbitrary abuse of power; for nothing short of that will authorize a review by the courts."

In *Salmon* v. *Board of Directors*, 100 Ark. 366, at page 369, 140 S. W. 585, at page 586, the court said:

"Again, it is alleged in the answer, and it is now insisted, that the benefits to the land in question to be derived from the improvement will not be commensurate with the amount of assessments levied, and that the annual assessment should not have exceeded 4 per cent of the valuation of the lands, which amount appellant tendered in court. The legislative branch of the government is, as we have said in several cases, the sole judge in the matter of creating improvement districts of this character, in establishing the boundaries thereof, and in determining, or in providing means for determining, the amount of assessments based on

benefits, and the courts will not interfere unless an arbitrary and manifest abuse of the power is shown. Mere mistakes of the lawmakers, or of those empowered by the lawmakers to make assessments, in fixing the amount or rate of assessment, will not be reviewed and corrected by the courts. *Moore* v. *Board of Directors Long Prairie Levee District*, 98 Ark. 113, 135, S. W. 819; *Board of Improvement* v. *Pollard*, 98 Ark. 543 S. W. 957."

"The decree of the court below is affirmed."

St. Louis Southwestern Ry. v. *Co.* v. *Board of Directors of Miller Levee District No.* 2, 207 Federal Reporter, page 342.

The decisions of the Arkansas Supreme Court holding that the finding of the legislature is decisive as to the property benefited, is in accord with the leading text writers on this subject and with the decisions of the United States Supreme Court.

"The whole subject of taxation belongs to the Legislature. So much is unquestioned. The authority may be exercised directly, or in case of local taxes, it may be left to local boards or bodies. If the Legislature has fixed the district and levied the tax, for the reason that in the opinion of the legislative body such district is plenteously benefited, its action must, in general, be deemed conclusive."

Cooley on Taxation.

"The rule thus laid down is a general one, applicable to all improvements of the class with which it deals, and the benefits thus fixed are the same for all property similarly situated with regard to the improvement. An attempt to determine benefits separately for each tract of land would probably, on account of the varying conditions of the evidence and the varying attitude of mind of the judge or jury which is to determine such questions, lead to as many different results as there

were different tracts of land involved in separate proceedings. The adoption of a legislative rule determining the amount and apportionment of benefits brings order out of what might in the absence of some fixed rule, come very near being chaos."

Page & Jones, on Taxation by Assessment.

"In exercising its power, the legislature may either act directly, determining the area benefited and the rate of apportionment absolutely; or it may delegate to local authorities the power to decide as to the necessity of the improvement, and this delegation may cover all or any of these points. The Federal Supreme Court holds that the legislature, acting directly, may determine the district benefited by a public improvement and lay down an absolute rule as to the apportionment of the expense among the parcels of land included. When this course is adopted, the act of the legislature must be deemed conclusive alike of the question of the necessity of the work and of the benefits as against the abutting property, and to open such questions to review by the courts upon the petition of any and every property holder would create endless confusion."

McGehee on Due Process of Law, 248.

We quote below from the U. S. Supreme Court decisions to the effect that the legislature may determine the area and property benefited, leaving to the commissioners the apportionment of the taxes and when it does so, its action is conclusive and beyond review.

"The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review." * * *

"The lands might have been benefited by the improvement, and so the legislative determination

that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact; and when the legislature determines it in a case within its general power, its decision must of course be final." * * * "When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.

In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

Spencer v. *Merchant*, 125 U. S. page 345.

"It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he

thereafter has is to a hearing upon the question of what is termed the apportionment of the tax *i. e.*, the amount of tax which he is to pay."

Fallbrook Irrigation District v. *Bradley*, 164 U. S. page 155.

We cite below various cases with which this court is so familiar that we refrain from making excerpts.

Kelley v. *Pittsburg*, 104 U. S. page 78; *French* v. *Barber Asphalt & Paving Co.*, 181 U. S. page 324; *Webster* v. *Fargo*, 181 U. S. page 394; *Cass Farming Co.* v. *Detroit*, 181 U. S. page 396; *Davidson* v. *New Orleans*, 96 U. S. page 97; *Houck* v. *Little River Drainage Dist.*, 239 U. S. page 260; *Wagoner* v. *Lesser*, 239 U. S. page 218; *Bauman* v. *Ross*, 167 U. S. page 548.

Counsel is quite familiar with the cases relied upon by the attorneys for the pipe line company, *Norwood* v. *Baker*, 172 U. S. page 269; *Myles Salt Co.* v. *Drainage Dist.*, 239 U. S. p. 478; *Gast Realty Co.* v. *Snyder Granite Co.*, 240 U. S. page 57.

Also with the recent cases that have gone up to the Supreme Court from Arkansas, *Kansas City Southern Railway Co.* v. *Road Improvement District No. 6*, 256, U. S. page 659; and *Thomas* v. *Kansas City Southern Railway Co.*, 261 U. S. page 483.

The decision in each one of the five cases last above cited was made because the court found under the peculiar facts in each of said cases that the assessment was so grossly discriminatory as to be unjust and absurd.

In the instant case the facts as developed from the testimony show a substantial benefit to the pipe line company, certainly fully as much benefit as will be

received by many thousands of lots in the City of Texarkana against which, just as in the case of the pipe line, an assessment of benefits has been made equal to the assessment against each of said lots for county and state taxes.

Recent decisions of the U. S. Supreme Court quote at length from the cases we have heretofore cited, and re-affirm the holding therein set forth. Said recent cases also refer to the five cases above cited on which the attorneys or the pipe line company must depend and distinguish said five cases because of the finding that no benefit could be received under the peculiar state of fact set forth in said cases.

The witnesses for the pipe line company in their testimony, admitted that a benefit was received by the parties working on the pipe line, by those hauling for the pipe line company with trucks and wagons and that a benefit was received by the owners of the pipe line in the access given by the roads to their officials, laborers and employees, who had to work on, repair and rebuild the pipe line, but in the testimony, they asserted such benefit was received by the owners, employees, teamsters and laborers of the pipe line company, and none by the pipe line itself.

Said testimony admits that some one received a benefit from the building of the roads, but attempts to distinguish between an inanimate object or tract of land and the person having the beneficial ownership of same, which appears to be sophistry. One might as well say a tract of farm land should not pay taxes for the road because the owner and not the land uses

and passes over the road. One might as well say that the city lot should not pay an assessment for water works or sewerage, since the owner of the house on the lot, and the party living in the house are the ones to get the benefit from the water and sewerage and not the house and lot.

The testimony of the plaintiff's witnesses showed that originally one line of pipe was laid on the right of way, and afterwards during 1920 to 1924, three additional lines of pipe were laid, and the attorney for the pipe line company asked the witnesses if such pipe before being laid was not personal property.

The pipe line and right of way were assessed the benefits to be received from the road, and although pipe not attached to the soil do not become real estate until laid on the right of way, yet after being laid, so as to become part of the right of way, they change from personal to real property just as the lumber and brick change when built into a house, from personal to real property.

The testimony of plaintiff's witnesses showed the average cost "stringing" or hauling and delivering pipe on the right of way to be $400.00 per mile although they stated that such cost at times would run to as much as $1000.00 per mile.

They admitted (what is a patent fact without such admission), that it is cheaper to haul over a hard surface than over a dirt road.

The testimony showed without contradiction that three times as many pipe could be hauled at a load over hard surface roads as over dirt roads, and the testi-

mony of witnesses was introduced that one-half of the hauling cost could be saved by using the good roads.

Three lines of pipe along the entire right of way, twelve and three-quarter (12.75) miles, have been laid in the last four years, and if one-half the cost of hauling has been saved, $200.00 per mile, on more than 37 miles, the road in four years has saved the pipe line company $7500.00, about two-thirds of the total benefits that will be collected, and we may presume that during the remaining eleven years an equal amount of saving will be effected from the hauling of pipe for construction and repair purposes. It would therefore seem that a very definite and direct benefit from the building of the road has been had by the pipe line company.

In the case of *Branson* v. *Bush*, the circuit court of appeals enjoined the collection of the tax. The Legislature had ascertained and declared that the road and all other real property in the district would be benefited more than the cost of the road and had assessed against the railroad and each tract of real estate a benefit equal to the assessment for state and county purposes. Four employees of the railroad company gave as their opinion that the railroad could receive no benefit from the improvement and the circuit court of appeals held that the evidence showed that railroad derived no benefit from the road. The supreme court set aside this holding as the evidence was not sufficient to show the action of the general assembly to be arbitrary, capricious or confiscatory in declaring the railroad benefited, citing from *Spencer* v. *Merchant*, and holding as follows:

> "It is decided that if the proposed improvement is one which the state had authority to make and pay for by assessments on property benefited, the Legislature, in the exercise of the taxing power, has authority to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited by it; and if it does so its determination is conclusive upon the owners and the courts, and the owners have no right to be heard on the question whether their lands have been benefited or not."
>
> *Bush* v. *Branson*, 251 U. S., page 189.

In the case of *Valley Farms Co.* v. *Westchester County*, a large area of land was assessed to build a trunk sewer using the county and state assessment as the measure of benefits; because of the location of said land in a valley, the property could not connect with the sewer without tunnelling through certain hills and four miles of connecting line would have to be built at probably a cost of $300,000.00 to use the trunk sewer.

The contention was made that no notice of hearing upon the apportionment of the assessments had been given, and the tax, without any opportunity to use the sewer save at an expenditure of $300,000.00 was palpably arbitrary and an abuse of legislative power.

After citing from many of the cases hereinbefore set forth the supreme court held: That the fact of the additional expense required to be made to use the sewer did not show that the lands were arbitrarily included and that they were subject to said tax:

> "The doctrine has been definitely settled that, in the absence of flagrant abuse or purely arbitrary action, a state may establish drainage districts and tax lands therein for local improvements,

and that none of such lands may escape liability solely because they will not receive direct benefits."

Myles Salt Co. v. *Iberia & St. M. Drainage Dist.; Gast Realty & Invest. Co.* v. *Schneider Granite Co.*, and *Kansas City Southern R. Co.* v. *Road Improv. Dist. supra*, present facts deemed sufficient to show action "palpably arbitrary, and a plain abuse" of power. Here the allegations make out no such situation. All lands within the district ultimately may be connected with some portion of the sewer, and we cannot say they derive no benefits therefrom, or that any were included arbitrarily, or for improper purposes.

It was unnecessary for the Legislature to give notice and grant hearings to owners before fixing the boundaries of the district so as to include their lands, and prescribe the method of taxation. And it is unimportant that the sewer had been completed before the boundaries of the present district were established.

Phillip Wagner v. *Leser, supra.*

Valley Farms Co. v. *Westchester County*, 261, U. S. p. 164.

In the Colorado tunnel case heretofore cited, the decision of the Legislature was held binding, even though direct and immediate benefits could not be shown to the land. The same benefit being received by lands within the taxed district as by other lands of the state not taxed. The supreme court upheld the classification of the Colorado Legislature as follows:

> "Classification as to special benefits. It is contended that no special benefits of a direct and immediate character will accrue from the tunnel to the lands lying within the district, as distinguished from the other lands in the state, and that hence the classification made by the act in

providing for the assessments solely upon the lands within the district, is entirely unreasonable and arbitrary. It is well settled, however, that if a proposed improvement is one which the state has authority to make and pay for by assessments on property benefited, the Legislature in the exercise of the taxing power has authority to determine, by the statute imposing the tax, what lands may be and are in fact benefited by the improvement; and if it does so, its determination is conclusive upon the owners and the courts and cannot be assailed under the 14th Amendment unless it is wholly unwarranted, and a flagrant abuse, and by reason of its arbitrary character is mere confiscation of the particular property."

Millheim v. *Moffatt Imp. Dist.*, 262 U. S., page 721.

In a recent road case arising in Arkansas, taxes were assessed against a railroad on an *ad valorem* basis to pay the debts of an abandoned road district. Such legislative assessment of benefits against the railroad was upheld by the supreme court and the decision was affirmed on the further ground as follows:

"So far as concerns the Federal Constitution, the validity of the tax may be rested, also, on other grounds. A state may defray the cost of constructing a highway, in whole or in part, by means of a special assessment upon property specially benefited thereby. But it is not obliged to do so. Road building is a public purpose which may be effected by general taxation. The cost may be defrayed out of state funds, or a tax district may be created to meet the authorized outlay."

Missouri P. R. Co. v. *Western Crawford Road Imp Dist.*, decided Nov. 17, 1924, U. S. Advance Opinions.

On the same day the famous House case given so much notoriety by the New York Times was decided, the court holding:

> "This cause grew out of the creation of District No. 5, Conway County, by Act No. 245, and assessment for benefits thereunder. With one exception the questions now raised are the same as those in cause No. 92. As an additional ground for challenging the statute plaintiff in error claims that it is arbitrary and beyond the power of the Legislature because the proposed improvement could not benefit plaintiff's lands, while other lands actually benefited were not included. The record does not show that this objection was placed upon any Federal ground in the courts below; but assuming that the point was properly made, we think it is clearly without merit. *Houck* v. *Little River Dist.*, 239 U. S. 254, 265, 60 L. Ed. 266, 274, 36 Sup. Ct. Rep. 58; *Miller & Lux* v. *Sacramento Drainage Dist.*, 256 U. S. 129, 130, 65 L. Ed. 859, 863, 41 Sup. Ct. Rep. 404; *Valley Farms Co.* v. *Westchester County*, 261 U. S. 155, 163, 164, 67 L. Ed. 585, 590, 43 Sup. Ct. Rep. 261."
>
> *Mrs. M. L. House* v. *Road Improvement District No. 2*, 266 U. S. p. 177.

In the Archer County case decided January 4, 1926, the supreme court held "that due process" had not been had as there was no legislative enactment authorizing the creation of the road district. If, as in the instant case, there had been a legislative act determining what property would be benefited by the road, the bond issue would have been upheld. We cite as follows from the court decision:

> "The legislature may make assessments for local improvements ratably on the basis of property valuation (*Valley Farms Co.* v. *Westchester Coun-*

ty, 261 U. S. 155, 67 L. Ed. 585, 43 Sup. Ct. Rep. 261), but where the amount to be raised is determined and the property to be assessed is selected as in this case, the requirement that the burden shall be so spread is not a legislative assessment.

Where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the state has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits."

Browning v. *Hooper*, 269 U. S. p. 396.

In the Arkansas road case that went from Sevier County to the Supreme Court, questions at law identical with the present case were involved. The zone system was used for rural property and the assessors placed assessments on the town lots and railroads in the proportion that they deemed them benefited by the road. The railroad appealed just as the pipe line company has done here on the ground that they received no benefit whatever, that their assessment was purely arbitrary and in contravention of the due process clause of the 14th Amendment to the Constitution. There, as here the legislature confirmed the assessment of benefits and there, as here, the employees of the railroad company, called as witnesses, asserted vigorously their opinion that the railroad would receive no benefit, without advancing anything substantial in support of said opinion.

The Supreme Court stated that a better case might have been made if the witnesses had devoted themselves to showing that the amount of benefits assessed against the railroad was excessive instead of attempting to

show that no benefit whatever would be received. The decision cited nearly all of the cases to which we have heretofore referred and distinguished between the five cases relied upon by the pipe line company heretofore mentioned. We cite from said case as follows:

> "By a long line of decisions in this court it has been settled that, where the State Constitution, as construed by the state court of last resort, does not provide otherwise, the legislature of a state may require that the cost of a local public improvement such as the construction or reconstruction of a public road, be distributed over the lands particularly benefited, and charged against them according to their value, their area, or the benefits which they will receive; may itself determine what lands will be benefited and in what proportions they will share in the benefits; and may avail itself, for the purposes of that determination, of any information which it deems appropriate and sufficient, including such as may be afforded by reports and estimates made in prior assessment proceedings having the same object. Only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power, can it be said to offend the due process of law clause of the 14th Amendment. * * *
>
> And only where there is manifest and unreasonable discrimination in fixing the benefits which the several parcels will receive can the legislative determination be said to contravene the equal protection clause of that amendment. *Kansas City Southern R. Co.* v. *Road Improv. Dist.*, 256 U. S. 658, 65 L. Ed. 1151, 41 Sup. Ct., Rep. 604; *Thomas* v. *Kansas City Southern R. Co.*, 261 U. S. 481, 67 L. Ed. 758, 43 Sup. Ct. Rep. 440.
>
> To justify an assessment of benefits to particular lands it is not essential that the benefits be direct or immediate (*Valley Farms Co.* v. *Westchester County, supra*); but it is essential that they

have a better basis than mere speculation or conjecture (*Kansas City Southern R. Co.* v. *Road Improv. Dist., supra*). In the case of railway property they may consist of gains from increased traffic, reasonably expected to result from the improvement." *Thomas* v. *Kansas City Southern R. Co., supra; Branson* v. *Bush*, 251 U. S. 182, 64 L. Ed. 215, 220, 40 Sup. Ct. Rep. 113.

"The special confirmatory act was recognized by the Supreme Court of the state as a legislative determination of the lands which will be benefited, and of the proportions in which they will share in the benefits. It therefore must be treated here as an admissible legislative assessment of benefits so far as the state constitution is concerned.

The evidence, as before outlined, falls short of showing that the assessment against the railway property was either palpably arbitrary or unreasonably discriminatory. The burden was on the railway companies to overcome the presumption attending the legislative determination, and this they failed to do; for, under the evidence produced, it is an entirely admissible view that the railway property will be substantially benefited by the road improvement, and that the benefits are fairly assessed as between that property and the farm lands and town lots. True, the amount of benefits which will accrue to the railway property is largely a matter of forecast and estimate; but the same thing is true of the farm lands and town lots, and also of benefit assessments in general. See *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 433; *Butters* v. *Oakland*, 263 U. S. 162, 165. Forecast and estimate based on a solid premise of fact and experience are not to be confused with mere speculation and conjecture. *Kansas City Southern Ry. Co.* v. *Road Improv. Dist. No.* 3, decided December 15, 1924, 69 Law Ed. p. ...."

We call special attention to the two cases relied on by the pipe line company in the district court, *Board of Directors Miller Levee District No.* 2 v. *Prairie Pipe Line Company*, 292 Fed., page 475; and *Kansas City Southern R. Co.* v. *Road Improvement District No.* 6, 256 U. S., page 660.

In the case of the pipe line company all property was assessed on an *ad valorem* basis, so the question of benefits to the property was not taken into consideration in a classification of the different kinds of property, whereas here, the assessors assessed all property on a benefit basis and placed against each piece and character of property what in their best judgment would be the actual benefit received from the building of the roads. On such benefit basis, the twelve and three-quarter (12.75) miles or right of way with the pipe lines and telegraph lines under and over said right of way, pay to the road district a maximum annual tax of six hundred dollars ($600.00); whereas in the levee case above referred to, six (6) miles of right of way with the pipe line thereunder paid an annual tax of twenty-five hundred sixty-one dollars ($2561.00). Therefore on the same proposition of mileage of right of way, in the levee case the pipe line company was assessed annually ten times the tax assessed in the instant case.

The method of assessment here being on a benefit basis and the annual tax being in the instant case less than one-tenth (1/10) of that in the Levee-Pipe Line case, we most respectfully suggest that the assessment in the instant case is not excessive in proportion to the benefits received.

In the *Kansas City Southern R. Co.* v. *Road Improvement District* case cited above, more than 25% of the assessment for road purposes was levied against the railroad track. The supreme court held such assessment excessive, but held that since the railroad would receive some benefit, an assessment for road purposes in proportion to the benefits received should be made against its track and the cause was remanded that such reasonable assessment of benefits might be made. Here only 9/10ths of one percent of the assessed benefits were laid against the pipe line right of way.

Counsel willingly admits that the capacity of the pipe line has not been increased by the building of the road, just as the fertility and productiveness of the farms along the road have not been increased, but the pipe line has been made accessible and the pipe line company, as shown by the testimony, has gladly availed itself of the use of such roads in laying the additional three lines of pipe and in repairing the pipe line already laid.

It would probably be impossible to show definitely in dollars and cents the exact increase in value received by the pipe line from the building of the good road. It would be equally impossible to show the exact benefit or increase in value, if any, received by rural property from the building of the good roads, and certainly it would be very hard to show what benefit, if any, has been received from the building of the good roads by the thousands of lots both vacant and with buildings on same in the City of Texarkana, a city of probably 15,000 population on the Arkansas side alone, yet

counsel for the pipe line company would hardly contend that the legislative finding of benefits by including Texarkana in the road district could be overcome by such proof as has been introduced in this cause.

McGrew, vice-president of the pipe line company, testified: That the replacement value of each pipe line per mile during the year 1920 was $11,500.00, and at that time there were two pipe lines on the right of way. This makes the value of the twelve and three-quarter (12.75) miles of right of way with the two lines of pipe, approximately $290,000.00 during the year 1920, and after the building of the two additional lines of pipe the value has become approximately $580,000.00; against this sum has been levied an assessment for benefits for road purposes of $60,000.00 of which only between $10,000.00 and $12,000.00 will be collected over a period of 20 years. The total benefits assessed and the total amount to be collected being approximately 9/10ths of 1% of the assessment and taxes to be collected in the road district.

Testimony was introduced showing that no crude oil is delivered or distributed in Miller County, but same is carried through pipe lines to the Standard Oil Refinery at Baton Rouge, Louisiana.

This court will take judicial knowledge of the fact that gasoline and lubricating oil are the principal products produced in the refining of crude oil, and that among the by-products one of the principal ones is the asphalt used in surfacing roads and streets.

This court will further take judicial knowledge of the fact that gasoline and lubricating oil are largely

used by motor vehicles and that the building of the good roads has been the principal cause of the marvelous increase in the use of motor vehicles and the enormous consumption of gasoline and oil.

It therefore appears that from the building of these roads in Miller County together with the connecting good roads in Arkansas and other states, the use of the pipe line has been so increased that from the one original line, now four lines have been laid from Oklahoma through Arkansas and Louisiana to Baton Rouge; as was stated in *Branson* v. *Bush*, no agency for the development of a territory equals that of good roads.

The attorneys for the petitioner and respondent are the same who appeared before this court in the Prairie Pipe Line case so strongly relied upon by the petitioner. Some members of this court may remember that after the statement of facts had been made by respondent's attorney in said Prairie Pipe Line case, one of the associate justices asked why the case had not been brought before the court on *certiorari* rather than on appeal, and upon respondent's attorney replying that *certiorari* had been applied for and the writ refused, said associate justice had the application for said writ sent for and found it was then too late to grant same because barred by the time limit.

If this court could have heard the Prairie Pipe Line case on its merits, doubtless this cause and others that have since vexed the circuit court of appeals for the eighth circuit would never have been brought.

Now that the holding of the Eighth Circuit Court of Appeals on the points at issue in this cause is again at one with and uniform with the repeated holdings of the Arkansas Supreme Court and of the United States Supreme Court, it is cause for congratulation rather than the issuance of the writ of *certiorari.*

Respectfully submitted,

HENRY MOORE, JR.,
Attorney for Respondent.

FILED
APR 11 1928
CHARLES ELMORE CROPLEY
CLERK

No. 577.

In the Supreme Court of the United States

OCTOBER TERM, 1927.

STANDARD PIPE LINE COMPANY, INCORPORATED, PETITIONER,

VS.

MILLER COUNTY HIGHWAY & BRIDGE DISTRICT, RESPONDENT.

ON WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO DISMISS, BRIEF AND ARGUMENT FOR RESPONDENT.

HENRY MOORE, JR.,
Attorney for Respondent.

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ON WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE.

Miller County Highway & Bridge District was organized by Special Act of the Arkansas Legislature, No. 153 (see page 617, Acts of Arkansas, 1915). It was found that funds were not available to build both the roads and the bridge and during the year 1917 a special act was passed by the Arkansas Legislature authorizing the bridge built to be paid for jointly by Miller County and Little River County, Arkansas.

Another act was passed authorizing the roads built separately from the bridge and confirming the assessments of benefits that had already been made under the Act of 1915 (see Act 15, page 61, Acts of Arkansas, 1917).

A third act authorizing certain of the roads that had been originally constructed with a gravel surface, to be paved with hard surface material and again confirming the assessment of benefits in the road district, was passed by the General Assembly of the State of Arkansas during the year 1925 (see Act No. 83, page 245, Acts of Arkansas, 1925).

The burden of the road taxes on the lands alone had become very great and during the year 1923, a special session of the General Assembly of the State of Arkansas passed the so-called Harrelson Act increasing the tax on gasoline to three cents a gallon and out of said funds paying about one-third of the annual bond and interest payments of the various road districts in Arkansas (House Bill No. 55, Harrelson, Act No. 5, Extraordinary Session of the General Assembly of the State of Arkansas, approved October 10, 1923).

The issues involved in this action have now become a moot question save for six years taxes (1919 to 1925 inc.). Even after the assistance of the payments made under the Harrelson Act, the burden of road taxes had become so great as to virtually confiscate the lands in many counties of the state and public opinion became crystalized to the effect that parties using the roads should pay to build and main-

tain same rather than the lands in the counties through which the roads pass. Governor J. E. Martineau, now U. S. District Judge for the Eastern Division of Arkansas, was elected on a platform to remove all road taxes from the land and the so-called "Martineau Act" was passed during the year 1927 increasing the tax on gasoline from three cents to five cents a gallon. From this fund, with the federal aid obtained, all roads are being built and all bonds and interest heretofore issued have been assumed by the State of Arkansas and no road taxes have been paid by any lands, pipe lines, railroads, etc., since the year 1926 (Act No. 11, page 17, Acts of Arkansas, 1927). Printed in full as appendix to brief.

The petitioner, Standard Pipe Line Company, Inc., on May 21, 1924, brought this suit in the U. S. District Court at Texarkana, Arkansas, to enjoin the collection of further road taxes on its right-of-way and pipe lines, said petitioner had already paid its road taxes for three years before bringing this action.

The respondent, Miller County Highway & Bridge District, filed its motion to dismiss petitioner's bill as petitioner had not availed itself of the administrative remedies afforded by the statute to have its tax removed or reduced. The district court overruled such motion to dismiss and upon trial on the merits found in favor of the petitioner and enjoined the collection of the tax at issue. Upon appeal, the Circuit Court of Appeals for the Eighth Circuit reversed the decision of the district court and the cause is now here on writ of certiorari.

PLEADINGS IN THIS CAUSE.

The petitioner, Standard Pipe Line Company, Inc., alleges in its bill that it purchased from the Prairie Pipe Line Company and now owns an oil pipe line located through Miller County, Arkansas, through which it transports crude oil from the Oklahoma oil fields to its refinery at Baton Rouge, Louisiana.

That the respondent, Miller County Highway & Bridge District, is a *quasi* corporation, organized by special act of the General Assembly of the State of Arkansas, during the year 1915; and that said road district has built hard surface roads aggregating a total of more than seventy miles and has assessed the pipe line together with all the other real estate in the district for the purpose of raising funds to pay for said roads.

That said pipe line is personal property and not subject to such assessment and that said pipe line has in no manner been benefited from the construction of the improved roads in the district.

The respondent, road district, filed its motion to dismiss the petitioner's bill on the grounds:

First. That under the decisions of the Supreme Court of the State of Arkansas, the petitioner's pipe line, which owns a right of way is real estate and subject to be assessed for improved roads.

Second. That the petitioner and its predecessor in title had not appealed from the assessment of benefits

within the time limit set by law, thirty (30) days, after such assessment was made by the commissioners.

Third. That the petitioner had not pursued or attempted to pursue its remedy at law to obtain redress and relief from the assessment complained of in said bill; and that the plaintiff had a full, adequate and complete remedy at law.

Fourth. That the time within which petitioner's action should have been brought, has expired and defendant pleads the bar of limitations against same.

Said motion to dismiss was, by the district court, overruled, and respondent excepted to such ruling. The petitioner then filed its amended and substituted bill in equity, setting forth at length the same facts as stated in the original bill, and further stating that the assessment of benefits made by the road district is five thousand dollars per mile for the twelve miles of right of way or a total of sixty thousand dollars; that of such assessment one per centum six hundred dollars, has been levied to be collected annually from the petitioner; that if petitioner is required to pay such annual assessment of six hundred dollars, this will interfere with the petitioner's rights in interstate commerce and will cause petitioner to suffer irreparable loss and injury; that neither the petitioner nor the Prairie Pipe Line Company from whom petitioner purchased the pipe line in question, had any knowledge of the filing of the benefits by said road district, and that the secretary of the road district did not publish the notice required by law as to the filing of such assessment of benefits; and prays that the road district

be perpetually enjoined from levying any tax against the petitioner's pipe line situate within the district in Miller County, Arkansas.

The respondent answered, admitting the making and filing of the assessment of benefits for the district and stating that the land was divided into zones, the land in the first zone, one mile from the road being assessed a benefit of thirty dollars per acre; in the second zone two miles from the road, twenty-five dollars per acre; and in the third zone three miles from the road, twenty dollars per acre, and admitting that the total assessment of benefits against the twelve miles of petitioner's pipe line right of way is sixty thousand dollars.

The respondent stated that in assessing benefits against the pipe line, the assessment for state and county purposes was used and in assessing benefits against the real estate in the City of Texarkana, Arkansas, and the telephone, telegraph, gas lines and other public utilities the assessment for state and county purposes was used; that said *ad valorem* basis was used in assessing all property in the road district excepting the lands in the country where the zoning system was used as hereinbefore set forth.

The respondent denied that the assessment is arbitrary, discriminatory or in violation of rights guaranteed the petitioner under the United States Constitution and further alleged that the original assessment of benefits save as to country lands was affirmed and reenacted during July of the year 1920; the re-assessment

was made because of the relocation of some of the roads in the district, which relocation changed the distance of certain lands from the road, thus causing said lands to be placed in different zones according to the location of said roads. No change was made in the assessment of the pipe line, the real estate in the City of Texarkana, Arkansas, nor in the assessment of the other public utilities and the reassessment was the same as the original assessment save for the re-zoning of the country lands due to the changes in the location of said roads.

The respondent alleged that by Section 6 of Act No. 15, passed by the General Assembly of the State of Arkansas, during the year 1917, the assessment of benefits in the road district was ratified and confirmed and that such assessment of benefits was declared to be just, equitable and proportionate; and said assessment was again ratified and confirmed by Section 7 of Act 83, passed by the General Assembly of the State of Arkansas, during the year 1925.

The respondent admitted that for four years one per cent of the assessed benefits, six hundred dollars, per annum was levied against the petitioner's pipe lines, but alleged said rate had now been reduced because of payments made by the state out of the gasoline fund collected for distribution among the road districts of Arkansas.

The respondent denied that the assessment of benefits against petitioner's pipe line and telegraph line was arbitrary, unlawful, discriminatory and unwarranted, but alleged that on the contrary petitioner had

received a great benefit from the building of the good roads.

The respondent alleged that the petitioner had not appealed from the action of the board of assessors and the commissioners in levying the benefits against their pipe line within the time allowed by law and had not attempted to pursue the remedy at law to obtain redress and relief from the assessment complained of and therefore petitioner has no right of action in a court of equity.

The respondent further plead the statute of limitations and estoppel.

After a trial on its merits the district court rendered its decree in favor of the petition, the cause was appealed to the U. S. Circuit Court of Appeals for the Eighth Circuit and said court held following the decisions of the State of Arkansas that the pipe line is real property; that the assessment of benefits for road purposes is not an interference or unlawful burden on interstate commerce; and that the legislative determination of benefits to the pipe lines and telephone lines of petitioner was justified.

The decree of the district court was reversed and petitioner has brought said cause before this said court on Writ of Certiorari.

TESTIMONY.

T. B. Morris testified on behalf of petitioner. I am the bookkeeper for the Texarkanian, a newspaper published in Texarkana, Arkansas. He identified the notice of the original assessment of benefits of the road district published in April and May, 1916; and the notice of reassessment of benefits published in July, 1920. Copy of such notice appears as Exhibit "A" to his testimony.

The witness testified that Mr. Hillford, the general manager of the Pipe Line Company lived at Mandeville during the year 1920 and was a subscriber to the Texarkanian (R. pages 38 to 40).

David Elkins, County Clerk of Miller County, Arkansas, testified; that he had understood that the book containing the assessment of benefits had been filed in the county clerk's office prior to the time he was elected clerk (R. page 42).

Louis Josephs testified on behalf of petitioner. I am the secretary of the road district. I identify this as the original book containing the assessment of benefits. The file marks have been cut out. I found the book in the office of Morris Sanderson, who was formerly the attorney for the district. I know this is the original assessment book.

The valuation of the poles, pipe, wire, plant etc., of the Prairie Pipe Line Company in the district is $59,-

340.00. The assessment of benefits is the same as the valuation for state and county purposes, $59,340.00.

This book was in my office before it was filed with the county clerk of Miller County. I saw the book several times after it was filed with the county clerk. The next time I saw it it was in Morris Sanderson's office.

A total of $540,000.00 in bonds has been issued from December 5th, 1916, to March 15, 1922. All bonds have been paid as they matured. There are now outstanding $353,500.00 of said bonds.

I know the notices required by law of the filing of the assessment of benefits were published as I, as secretary, issued vouchers payable to the Texarkanian, the paper publishing said notice. After the reassessment of benefits was made, the Board of Assessors met to hear complaints. This reassessment was made in 1920 and shows the benefits against the Prairie Pipe Line Company to be $60,000.00.

All of the City of Texarkana, Arkansas, is included in the road district and the north half of Miller County.

I did not assist in making the reassessment of benefits, I was the secretary of the road district and know that the assessors held hearings on such reassessment.

Mr. Webber presented a petition asking a reduction for the Two States Telephone Company; and Mr. David Arnold, one of the attorneys for petitioner, appeared on behalf of the Southwestern Gas & Electric Company; and Mr. Henry Moore, Jr., appeared on behalf of certain clients. These hearings were held in the State National Bank Building before the Board of Assessors where it regularly met.

During Mr. Hillford's administration as general manager for the Prairie Pipe Line Company, Morris Sanderson was his attorney (R. pages 45 to 57).

George T. Conway testified on behalf of the petitioner. I am one of the assessors for the Miller County Highway & Bridge District and have served as assessor since the district was organized and was assessor when the original assessment was made and when the reassessment was made. The country land was placed in zones, the land within one mile of the road in Zone 1, was assessed a benefit of $30.00 per acre; that within two miles of the road in Zone 2, was assessed a benefit of $25.00 per acre; and within three miles of the road and beyond in Zone 3, and assessed a benefit of $20.00 per acre. We thought the benefit from the road was due to the location of the road and the proximity of the land to same and not to the quality of the land. We assessed the benefit to the Pipe Line Company at $59,340.00 the amount of the assessment of the pipe line for county and state purposes. We used the same basis for the other utilities, Gas & Electric Company, etc., after the notice of the first assessment, numerous hearings were held at the courthouse to hear protests, some of them almost becoming indignation meetings. I suppose we met with a dozen different corporations including the Missouri Pacific Railroad Company. The original assessment book was filed with the county clerk and I got him to give it to me when we were holding these meetings.

We made a reassessment of benefits four or five years later, during the year 1920, the lands outside of the city were assessed in zones just as they were the first time with reference to the proximity of the land to the road. The Prairie Pipe Line Company was assessed $5,000.00 per mile of right of way or a total of $60,000.00. In Texarkana we again used the *ad valorem* basis and assessed benefits at the same as the assessment for taxes for state and county purposes, a total difference of a few hundred dollars in the reassessment of the Pipe Line Company from the original assessment, possibly was made as a matter of bookkeeping.

Morris Sanderson, the attorney for the district, advised us in making the assessment. We did not arbitrarily assess the Pipe Line Company, but we thought they would be benefited to the amount of the assessment from the good roads and in using the road going to and from their work.

Mr. Hillford, the manager of the Pipe Line Company, had his office right next to mine during his life time. I knew him quite well and he made no complaint and received no complaint that I know of about the assessment from the Prairie Pipe Line Company. The 31½ acres on which the pumping plant of the Pipe Line Company is situate is right on the road and although the most valuable piece of land in the district, outside of the City of Texarkana, it is assessed a benefit of $30.00 per acre, the same as other land in Zone 1.

In assessing the benefits in the City of Texarkana, we used the assessment for state and county purposes as the amount of the benefits.

The assessors did not do the clerical work, but employed J. H. Thomas to do same. They instructed him as to the benefits to be assessed against each tract of land and saw that this was done before signing the assessment roll. The public utilities were assessed the same as the real estate in the City of Texarkana, the benefit assessment being the same as the tax assessment for county and state purposes.

Under the Act of 1917, under which the second assessment was made, a different procedure was used than in the original assessment. The assessors were ordered to show the valuation of the lands as they appeared on the county tax books and to show the value per mile of the railroad, gas, electric light lines, telegraph or other public utility and pipe lines as they appear on the county tax book and then opposite each piece of property was placed the name of the owner and the amount of the betterment. The reassessment was made because the roads were changed from the location as originally laid out, and this caused some lands in zone one to go into zone two, and vice versa, some land in Zone 2 or 3 went into Zone 1. The roads had been built when the reassessment was made. The benefits to the property in the City of Texarkana and the public utilities remained the same as before, being assessed a benefit equal to the amount of the assessment for county and state purposes.

The two railroads, the St. Louis Iron Mountain & Southern (now the Missouri Pacific), and the St. Louis Southwestern Railway did not show on the reassessment as the Missouri Pacific Ry. paid $25,000.00 in cash and

the Cotton Belt Railroad Company (St. Louis Southwestern Railroad), about the same amount. This compromise agreement was ratified by Act of the Legislature.

The office of the Prairie Pipe Line Company was next door to mine at that time on the same floor of the State Bank Building and I was well acquainted with Mr. Hillford, the then manager of the Prairie Pipe Line Company. Mr. Hillford knew about the assessment of benefits both the first time and the reassessment.

Ten years ago we were not as familiar with improvement districts as we now are and before making the assessment, the assessors secured all the local information and help that they could and wrote all over the country asking for information. We went into this fully and had various meetings to reconcile the contending factions and still think the system we used one of the fairest and most reasonable ways in which one can arrive at benefits received from an improvement of this kind. After this investigation, we decided to use the zoning system for the country acreage and the *ad valorem* system for the city property, public utilities, telegraph lines and pipe lines.

When the first assessment was made, we were working continuously adjusting and equalizing the matter for thirty days or six weeks. When the second assessment was made I had my office in the State Bank Building and the other assessors met with me from day to day whenever I sent for them. We did not stay in session all the time. After hearing any one,

if no one else appeared, we would adjourn until another day (R. pages 58 to 72).

A. B. Little a witness for the petitioner, testified; during the years 1915 to 1917, I assisted the tax collector in collecting revenues in Miller County, Arkansas. I knew Mr. Vantuil, who paid the taxes for the Prairie Pipe Line Company, and called his attention to the fact that we overlooked the road tax in furnishing his tax statement. Witness identifies letters written and received from Mr. Vantuil, tax commissioner for the Prairie Pipe Line Company during April, 1917; also identifies tax voucher of the Prairie Pipe Line Company paying the road taxes of date April 26th, 1917 (R. pages 73 to 79).

W. D. Fulton a witness for petitioner testified: I am the chief engineer of the pipe line company. He identified the map of the district attached to the transcript. During the year 1920, there were 25.49 miles of pipe line in the district. The Standard Pipe Line Company acquired the pipe line right of way of the Prairie Pipe Line Company in December, 1922. There are approximately twelve and one-half miles of right of way occupied by the pipe line in the road district, and at present time there are laid 51.25 miles of pipe on said right of way; also a telephone line was built on the right of way during the year 1923. Two lines of pipe that were laid have to my knowledge been taken up. This was done during the spring of 1924 and winter of 1924 and 1925.

In 1923, two additional lines were put through the entire district and pipe was unloaded at Paup's Spur and we used trucks and teams and hauled the pipe over the improved gravel roads. I do not know whether the pipe was unloaded at the side of the gravel road or was usually hauled to where it was to be laid. I admit we could haul more over the gravel road than we could over a dirt road, certainly we can haul cheaper and quicker over hard surface roads than over dirt roads. We used about sixty men for six months in building the pipe line and would drive over these roads inspecting the pipe line. The company had regular trucks that came to Texarkana for men and took them to and from their work. I do not think this was any benefit to the company, but only to the men who rode in the trucks. The pumping station and headquarters at Mandeville are right on the public road and any one living there would know the road was being built. I think the road would benefit a farmer. I do not think a road will benefit a pipe line or a business though it would the parties who worked at and who owned the business (R. 80 to 94).

Copy of form of right of way deed used by the company appears at (R. 96).

R. A. McGrew a witness for petitioner testified: I am the vice-president of the Standard Pipe Line Company. During the year 1922, we had two lines of eight (8) inch pipe laid on right of way in the road district. I do not consider that the good roads have helped this pipe line.

The pipe line enters Arkansas from Oklahoma, goes into Louisiana and ends at Baton Rouge where the refinery is located. The oil transported comes from the State of Oklahoma. The replacement cost of eight inch pipe line in this territory during 1920 was eleven thousand five hundred dollars per mile. Unless hard surface roads were constructed especially for pipe line construction, they would not benefit the pipe line. Sometimes it may cost in excess of one thousand dollars per mile to haul pipe, the general average is about four hundred dollars per mile. I have only been on the right of way of this line once.

The benefit from a good road does not come to the property or the houses, but to the owner of same. Generally speaking, I do not consider that good roads would give any excess of labor that could not be had without them. The laborers in working on the pipe line were carried over these good roads in trucks. I do not know whether it would be any benefit to a plantation to have good roads on which laborers could be taken to work on the plantations. I cannot tell whether good roads would benefit any kind of enterprise or business by giving a way to carry laborers to that business. We have a fleet of trucks and we use them everywhere in this territory (R. 97 to 112).

W. J. Springer a witness for respondent testified: I am chief of the joint fire department of Texarkana, Arkansas and Texas. One day last week, with the crews of the Texarkana Fire Department, I made a run over the good road about six miles to Mandeville and

assisted in putting out a fire at the pumping station of the pipe line company. I made the run in about fifteen minutes. On reaching there I advised those in charge what should be done and my men with the pipe line company men, under my direction got the fire under control. It is problematical to say what would have taken place had I not been there. The property was saved from burning and except for the good road I could not have answered their call. Our equipment weighs about seven and one-half tons and I might have torn it up or killed some of my men if I took it over ordinary country roads. I suppose the parties in charge accepted my suggestions because of my knowledge and experience in fighting fires. They were very nice and seemed willing to have me advise them. We did not go of our own suggestion, but at the request of the pipe line company our apparatus was taken out there (R. 113-117).

E. L. Stern a witness for petitioner testified: I am superintendent of the Texas Pipe Line Company in Louisiana. I can not see that the improved roads are of any advantage to pipe lines. I know nothing about the pipe line under discussion. I do not think good roads would help telegraph or telephone lines. A good road may help a pipe line in reducing the cost of stringing the pipe, but this is small. Good roads may help a farmer if he hauls with trucks. I do not believe a good road would help an iron foundry or any other kind of business. It would not help a pipe line company for a

good road to give access to same. If I had a road parallel to a pipe line I would prefer to haul over a hard surface road. Naturally we use the good roads as they furnish the most economical way (R. 117-121).

H. C. Black a witness for petitioner testified: I am the tax commissioner of the Prairie Pipe Line Company and have been such commissioner since July, 1919. I render the tax assessment and pay the taxes for the entire system which extends from middle Texas through Oklahoma, Kansas, Missouri, Illinois and Indiana. We also owned the pipe line in Arkansas from the Oklahoma-Arkansas line to the Arkansas-Louisiana line. The Standard Pipe Line Company owns the line that we connected with in Louisiana and has since bought the line in Arkansas from the Prairie Pipe Line Company.

In determining the value for assessment purposes of our pipe line in Arkansas, the tax commission took into consideration the earnings of the pipe line.

Mr. J. B. Hillford is dead. During his lifetime he was the maintenance superintendent of the pipe line company. He had an office in Texarkana and looked after the operation of the pipe lines. From his office in Texarkana there was a private wire over which he had direct telegraphic communication with the home office in Kansas. He made certain reports daily as to the amount of oil and condition of the lines and also reported anything else of interest to the company.

Mr. Vantuil was the tax commissioner when the Miller County Highway & Bridge District was organized, and remained tax commissioner until his death about

July, 1919 when I succeeded him. Taxes were paid to the road district by the Prairie Pipe Line Company for three years, 1916, 1917 and 1918. I had the injunction suit brought to prevent the payment of the road taxes for the year 1919, after I took charge of the tax department. I went through the files in reference to taxes due Miller County Highway & Bridge District and learned about same prior to the payment of taxes due in April, 1920. During the year 1919 I knew that these road taxes had been assessed against the pipe line company.

As the reassessment made an increase of only $200.00 in the total of the benefits assessed, I know the increase in the amount of taxes due the road district for the year 1919 was because of an increase in the rate.

I was in the right of way department of the company from February, 1915, until July, 1919. I have heard that two additional eight inch lines have been laid by the Standard Pipe Line Company since they purchased this property and I agree that it would be bad judgment to lay additional lines unless the production had increased so the lines are needed (R. page 121 to 134).

H. G. Sanderson a witness for respondent testified: I am the collector and tollkeeper for the bridge across Red River near Index and have held such position since September, 1923. You must go over the good roads in Miller County to reach said bridge. During the years 1923 and 1924 the pipe line company used trucks and hauled a great number of men over the roads and across

the bridge; also pipe. During the last seventeen days of October, 1923, they paid by check $173.45 in tolls for trucks and teams that crossed the bridge. Autos are charged 50c, light trucks 75c, and heavy trucks $1.00. They also had a number of two and four mule wagon teams. The trucks carried pipe, tools and other materials. Also they had trucks that hauled men out to work. One truck hauled white men and made two or three trips every day. The trucks could not get to the bridge without going over the good roads. In addition to the money paid me set forth above, by check, for the pipe line company, additional amounts were paid me in cash.

This work on the pipe line went on from the first of September, 1923, until the latter part of 1924. The entire fall of 1923 and all of 1924. The work was digging up and distributing pipe, digging ditches, putting in new pipe, joining it up and painting it.

I have had considerable experience in farming and helped build good roads in Little River County. It is an advantage to have a good road over which men and materials may be transported. It is a whole lot cheaper to haul over a good road, than over the ordinary dirt road. The loads the pipe line company hauled could not have been brought at all over common country roads. They hauled pipe out on trucks and unloaded by the side of the road and then re-loaded on wagons and hauled it out on the line. The trucks hauled from Mandeville and Paups Spur a distance of about 7½ miles. The amount paid me for tolls by the pipe line company in October would probably be over an average

of the amount paid for the other months of 1923 and 1924. In my opinion by means of the good roads the cost of hauling the pipe was cut in half. The pipe line company hauled pipe across the bridge both ways. They brought the old pipe from Little River County into Miller County, and hauled new pipe from the railroad at Mandeville and Paups Spur across the bridge into Little River County.

From my place on the bridge I could see a mile and one-half down the highway and I know the pipe were hauled out on trucks and unloaded by the good road, then it was re-loaded on wagons and hauled along the pipe line right of way. They would haul four or five joints of pipe on a wagon and twelve to fifteen joints on a truck. The road crossing the bridge from Ogden into Little River County is a dirt road. In winter it gets nearly impassable. It was cheaper to haul from Paups Spur over the good road and across the bridge than to haul the pipe a shorter distance from Ogden over the dirt road. Regardless of the reason, I know the pipe line company hauled the new pipe from Mandeville over the good road and over the bridge into Little River County and picked up the old pipe and hauled back into Miller County going toward Mandeville with it (R. 135-144).

D. B. Owens a witness for respondent testified: I worked for the pipe line company about three months during the summer of 1921, acting as time keeper for them. They were putting down about two miles of pipe in a loop from Ogden across Red River and were work-

ing eighty to ninety men. Mr. Hillford was superintendent of the job. These men went to their work principally in auto trucks, coming from Texarkana ten or fifteen miles over the hard surface road. Ice and supplies were hauled out in trucks over said road and pipe and river clamps put around the pipe were hauled out from Paups Spur over the road. Enough pipe was hauled to put down two miles. Hauling was done mostly by trucks. It was unloaded along the good road and distributed with wagons and teams. It was too rough for trucks to go in the woods and the ground was too soft. On the hard surface road, the trucks carry ten or fifteen joints, on the dirt road wagons were used, after the pipe was unloaded from the trucks and they carried three or four joints. Work was done on both sides of the river. If there had been no good roads to haul over, I think the pipe would have been unloaded at Whatley a switch on the Kansas City Southern Railroad. J. B. Hillford was in complete charge of everything for the pipe line company (R. 146 to 155).

L. F. French a witness for respondent testified: I have been for more than twenty years in the contracting business doing levee and road work and hauling. During the years 1923 and 1924 I hired my teams by the day to the Standard Pipe Line Company. I hauled for them between 45 and 60 days in Miller County, crossing the river and hauling for them in Little River and Sevier Counties. I used mules and wagons and hauled some pipe from Mandeville and from Paup Spur over the good road to the pipe line right of way

and hauled some from the storage piles on the good road along the pipe line right of way.

It was about three and one-half or four miles from Paup Spur to the distributing point on the good road where the pipe was unloaded. This being the point where the pipe line crosses the good road. On the gravel roads the teams can haul all the wagons will hold. It is simply a matter of the capacity of your wagon. After leaving the hard surface road, I think I pulled six to eight joints. I do not think the company distributed any pipe on its right of way with trucks, but hauled them all on the good roads and placed them in piles where the good road crosses the pipe line right of way. It is a great advantage in hauling heavy materials such as pipe, to have a good road over which you may haul. I did not haul any pipe from the Kansas City Southern Railroad until I crossed the river into Little River County.

There is no good road after you cross the bridge, between the bridge and Ogden. In hauling from Paup Spur there was no way to get out to the pipe line except over the good road. In hauling with trucks the pipe line company did not take the trucks off the gravel road. Along the pipe line right of way at times it was such bad hauling that all wagons would have to be unloaded and the pipe snaked or skidded along the right of way one at a time. One single bad place would keep you from hauling a load across same (R. 173 to 180).

W. J. Paulk, a witness for respondent testified: I have been employed as an accountant for the Miller County Highway and Bridge District for several years. In the bottoms cleared land is assessed at $10.00 per acre, and the average wild land $4.50 in the hills, the assessment is $5.00 to $6.00 per acre for general taxation. The assessment of benefits for road purposes in the entire road district is $6,687,178.00. The assessment of benefits for road purposes in the City of Texarkana is $2,561,000.00. Outside the City of Texarkana such assessment for road purposes is $3,664,445.00. The total acreage of land in the district is 136,322 acres. The average assessment of benefits for road purposes per acre against the land outside the city is $26.88 per acre.

On the assessment of benefits there was levied for road taxes the following percentage:

1916	6-2/3 mills
1917	6-2/3 mills
1918	7 mills
1919	7 mills
1920	10 mills
1921	10 mills
1922	10 mills
1923	10 mills
1924	8.5 mills

The benefits assessed against any track of land are multiplied by the number of mills for the year levied, and the result is the amount of taxes that must be paid for road purposes by that land for said year. The assessment for the purpose of general taxation is not considered and has no bearing on the collection of taxes for

road purposes, the road taxes being levied on a benefit basis (R. 180-182).

E. H. Peyton, a witness for respondent testified: I operate a farm at Paup Spur and have been staying on the farm practically all of the time since 1917. The good roads had not been completed when I moved there. In the hills there were passable roads, but if one went into the Red River bottoms, after a rain they were impassable. An auto could not be used at all. It took four mules to pull a two mule load. There was no road of any kind between Paup Spur and the bridge at Index. One had to just wander around through the woods to get there.

During the year 1921, the pipe line company unloaded a large quantity of pipe at Paup Spur, I understand about twenty-one cars. Trucks hauled the greater part of this out on the gravel road and placed it in dumps and from there it was distributed on the pipe line right of way by teams. My teams hauled during that time for the pipe line company. After you left the good road there was no road through the woods. It was very wet and bad at times and two or three pipe were all we could haul at a load after leaving the good road. On the good road, it was not a question of what your teams could haul as they could pull all the wagons would hold up. I have seen trucks go out from Paup Spur over the good road with fifteen to twenty pipe. In hauling with wagons from the dumps where the pipe was put along the good road, it would be so bad on the pipe line right of way that we would unload our wagons

and hitch a pair of mules to just one pipe and snake it along the right of way.

My farm will not raise any bigger crops because of the good roads, the advantage from a good road is making a place accessible. The pipe line company has been benefited as you can go close to their line at almost every point on a good road and they can haul their materials and men over the good roads to work on and repair the line. They haul men in trucks from Texarkana and many of the men came to work in their own cars. During the year 1921, at one time they worked about one hundred fifty men. Work was commenced again on the pipe line in the year 1923 and finished during the year 1924, and a quantity of pipe was unloaded at Paup Spur. The pipe were taken out over the good road from Paup Spur in trucks. They hauled from fifteen to twenty pipe at a load. The trucks could not leave the good road. They did not work as many men as in 1921, working this time perhaps seventy-five to one hundred men. I would see the trucks coming by my place to work with 25 to 30 men on a truck. The pumping station is right along the good road and the men at work there came out in cars and trucks from Texarkana.

While this work was going on, old pipe that was taken up in Miller County and from across the river was brought in to Paup Spur over the good road by trucks. It was hauled by teams to the good road, then the trucks were loaded and brought it in. There were two distributing points or dumps on the good road, one

on Dr. Collins' farm and the other near the bridge at Red River (R. 183 to 189).

L. C. Adams testified: I live at Texarkana and I am vice-president of the road district. I own a farm in Red River bottoms. There was no road from Paup Spur to Index so one could go into Little River County before the good roads were built. In dry weather one could haul in the bottoms, but when it was wet, I had to use four and sometimes six mules to haul a two mule load. We shipped our cotton from Homan because we could not haul it to Texarkana. Now I can bring in 16 to 20 bales over the good roads with a four mule team. In the bottoms the land is black buckshot, so it is impassable in wet weather.

Within the last two weeks, since the fire at the pumping station at Mandeville, a large number of workmen have been coming out over the good roads in trucks and cars. I formerly ran a livery business and have had considerable experience in hauling. I think the pipe line company has been greatly benefited by the good roads. They can haul four times as much over the good roads as over the dirt roads. The only way anything can be benefited by a good road is by the traffic over same. It does not make the farm raise any more. The benefit of good roads is from accessibility.

Some of the cleared lands are now worth $100.00 per acre, and some of the woodland, $40.00 per acre. The increase in value has come from a variety of circumstances. The first advance was because of the

levee being built, then the land advanced because a drainage ditch was being dug, then from the highway being built and being close to Texarkana; also the advance in the price of cotton made land go up (R. 189 to 194).

The two acts creating the district and act creating Red River Bridge District were introduced in evidence. Under Section 7 of the 1915 Acts, parties aggrieved by the assessment made on their land, must appeal in thirty days from the board of assessors to the commissioners and if still aggrieved then appeal in thirty days to the County Court of Miller County.

C. S. Christian a witness for the respondent testified: I am a civil engineer and have resided in Texarkana for fourteen years. I was the engineer in charge when the Miller Levee District was built and am still its engineer. I was the engineer in charge of building the roads in Miller County Highway & Bridge District and am still its engineer. Said roads were commenced in 1917 and completed, I believe, during the year 1918.

Witness identified the map introduced in evidence showing the location of the pipe line and the good roads. The pipe line is crossed by the good roads at four different places and said roads are within a mile and one-half to two miles of all parts of the pipe line.

Before these roads were built there was a county road from Texarkana along the Missouri Pacific Railroad to Fulton. There was no road from Paup's

Spur to Index. Most of this country was in the woods and you could not go through with wagons; at times when it was wet you could hardly go through on horseback. On the road from Texarkana to Fulton the bridges were wood and in bad condition. The road had only a natural dirt surface and even in dry weather continuous hauling of heavy loads would have cut it up so bad that it would have become practically impassable. There is still no improved road between Index and Ogden on the other side of the river. It is a decided advantage to haul over hard surface roads, the load limit can be increased and much higher speed maintained, thus reducing the cost of hauling. Before these hard surface roads were built over the county roads, there were seasons of the year when you could not haul an empty wagon over same. During a dry season 2500 pounds would have been a good load for a farm wagon.

J. B. Hillford was superintendent for the Prairie Pipe Line Company in Miller County during the year 1921. He came to see me at various times to secure permission so his company could make crossings with the pipe line over and through the levees.

The road known as the Richmond road from Texarkana into Little River County, is about eight miles west of the state line in Texas. There was no road from Texarkana to Ashdown and one had to either go by train to Ashdown or by horseback through the woods. The State Line Road from Texarkana to Index was built in 1917 when Miller County Highway & Bridge District was formed. Except the road from

Texarkana to Fulton there were only farm roads through the north end of Miller County in the Red River bottoms, there were no public roads there (R. pages 156 to 172).

On being recalled, *R. A. McGrew*, vice-president of the pipe line company testified: That his estimate of the cost of reproduction of the pipe line is $11,500.00 per mile for one string of 8-inch pipe; that it would cost four times that or $46,000.00 per mile a total of $552,000.00 to replace the four lines of pipe now laid along the 12 miles of right of way owned by the pipe line company (R. 235-236).

Louis Josephs, secretary of the district on being recalled, testified: That the total assessment of benefits against the pipe line company is $60,000.00. That as shown by W. J. Paulk's testimony, 1%, 10 mills, has only been levied for four years, it being less for the other years; that if the total of 1% had been or should be levied for the entire period of the bond issue for twenty years, the total taxes to be paid by the pipe line company would be $12,000.00, but the present levy, which will continue, is only 8-2/3 mills a year (R. 236-239).

The map filed as an exhibit has attached a memorandum furnished by the pipe line company showing the assessed benefits for the property in the district, the number of miles of right of way owned by the pipe line company and the number of miles of pipe occupying said right of way.

Excerpts from acts passed by the General Assembly of the State of Arkansas affecting Miller County Highway & Bridge District.

Excerpts from Act No. 153, creating the district passed during the year 1915:

"The Board of Assessors shall within one hundred and twenty (120) days after their organization complete their duties by filing with the commission a list showing the description of the property of the district, the owners' names, as far as same appear from the last county assessment, and such corrections as they may ascertain should be made, and the valuation of each lot, tract or parcel of land, railroad, street railway, gas and electric light plant, water plant, tramroads, telephone and telegraph lines, pipe lines and all other franchises of whatsoever description in any way connected with the realty in said district without the improvement, and the valuation with the improvement, and the benefit estimated to accrue to each lot, tract or parcel of land, railroad, tramroad, street railway, gas and electric light plant, water plant, telegraph and telephone lines, pipe lines and all other franchises of whatsoever description in any way connected with the realty in said district by reason of the improvement; and shall file the same with the county clerk of Miller County for the inspection of all persons interested. Notice of the filing of said assessments shall be given by publication in one newspaper published in Texarkana, Arkansas, and said notice shall set a date not less than thirty days distant, and the place where any complaint may be made by any landowner, railroad, tramroad, street railway, gas and electric plant, water plant, telegraph or telephone line, pipe line or any franchise whatsoever in any way connected with the realty in said district before the Board of Assessors of any assessment made against his or its property.

The said Board of Assessors shall correct any inequality, injustices, or errors, which they may find in the assessment, and shall hold meetings for the purpose of hearing the complaints of the owners of any such property in said district as to said assessment, and shall increase or decrease the assessment so as to adjust the burden of the assessment to the benefit to accrue to the real property. * * * Any property owners as aforesaid, aggrieved by the action of said Board of Assessors, may take an appeal to the commission within thirty days from the action of the Board of Assessors, upon his complaint; or any other property owner (fol. 175) aforesaid may appeal from the action of the Board of Assessors from any assessment which acts unequally upon his property.

The commission shall hear all appeals and determine the same, and appeals may be taken from the commission to the county court in the same manner as is now provided by law that appeals may be taken from the county equalization board to the county court, which said appeal, shall be taken within thirty (30) days from the action of the commission complained of" (R. 199, 200).

"That all railroads, street railroads, tramroads, right-of-way, roadbeds, pipe lines, telegraph and telephone lines, and all other franchises in any way connected with the realty of said territory, and the appurtenances in said district, shall be assessed according to the betterments and increase in value in like manner as herein prescribed for real estate, except that said assessment shall be made per mile, and no error in the name and residence of the owners or the description thereof shall invalidate said assessment, if sufficient description of the property sought to be taxed is given to ascertain where it is situated" (R. 201-202).

"Section 15. In the event of the description of any lot, tract or parcel of property upon the list of the assessment hereinbefore provided to be made, shall for any reason be uncertain, indefinite or insufficient, then in any suit brought to enforce the payment of any assessment, the court shall have power to correct such description and enforce the collection of any assessment due thereon, having due regard for the rights of any parties who may have intervened" (R. 207).

Excerpts from Act No. 15, amending the Act creating the district so the bridge across Red River could be built by Miller and Little River Counties, Arkansas, and the highways in Miller County, constructed separately from said bridge, and ratifying the assessment of benefits made by the road district, passed during the year 1917:

"Section 6. The assessment heretofore made by the assessors for said district is hereby ratified and confirmed as the (fol. 188) assessments of the benefits which will accrue from the making of the improvements herein contemplated, and the assessors heretofore named by the board shall proceed to make a similar assessment upon the lands in Hempstead and La Fayette Counties hereby added to this district" (R. 214).

"Future assessments of benefits shall be made in books to be furnished by the board, which shall show the lands of the district as they appear on the county tax books, with such corrections as may be necessary, and shall also show the railroad, street railway, gas and electric light, water, tramroad, telephone, telegraph and pipe lines by the mile, and also all other franchises of whatever description in any way connected with the realty in the district. Opposite each piece of property shall be placed the name of the owner, if known to the assessors, and

the amount of the betterments. Such assessment shall be filed with the county clerk of Miller County, for the inspection of all persons interested; and upon its filing, the secretary of the board shall give notice by publication in a newspaper published in Texarkana, Arkansas, that the assessment has been filed, and shall set a date not less than thirty days distant and a place where any person interested may appear before the Board of Assessors and complain of the assessment of his property or of the assessment of any other property in the district.

At the time fixed in said notice the Board of Assessors shall meet and shall hear the complaints of property owners, and shall increase or decrease the assessments so as to adjust the burden thereof to the benefit that will accrue" (R. 215).

"Section 14. In the event the description of any lot, tract or parcel of property upon the list of the assessment hereinbefore provided to be made, shall for any reason be uncertain, indefinite or insufficient, then in any suit brought to enforce the payment of any assessment, the court shall have power to correct such description and enforce the collection of any assessment due thereon, having due regard for the rights of any parties who may have intervened" (R. 222).

Excerpts from Act No. 83, passed during the year 1925, ratifying the assessments made in the road district.

"Section 7. It is ascertained and hereby declared that the assessment of benefits of said district is just, equitable and proportionate, and the same is hereby ratified and confirmed and shall stand as the assessment of benefits of said district until a new assessment is made in the manner provided by the said Act No. 15 of 1917. Acts of Arkansas, 1925, page 249."

Excerpts from the so-called Martineau Act No. 11, passed by the General Assembly of the State of Arkansas, during the year 1927, requiring the state to pay all bonds and interest due by all road districts in the state out of the five cent per gallon gasoline tax and relieving the lands of the state from any taxes for road purposes.

"Section 3. The commission shall, as soon as possible ascertain the amount of the outstanding valid bonds issued by road improvement districts in this state, the dates of the maturities thereof, and the annual interest due thereon, and it shall be the duty of the Circuit Clerk of each county to furnish the commission with such information. The commission shall each year, beginning with the year 1927, allot to each road district in the state now having outstanding bond issues an amount equal to its bonds maturing during the year, together with the interest payable by such districts during the year, plus a paying charge of one-eighth of one per cent of bonds to be paid and one-fourth of one per cent of interest to be paid, and shall certify to the State Auditor the amount allotted to each road district. The auditor shall issue warrants for such amounts on the State Highway fund, and procure St. Louis, Chicago or New York Exchange for said amounts payable to the order of the Bank or Trust Company named as payee in the pledge or mortgage of the road district, and if more than one Bank or Trust Company be named as payee, then to one of the named payees. Such warrants shall state in the face of the warrant that it is for exchange payable to ..... Bank or Trust Company for the account of the particular Road District. Said Exchange shall be mailed in all cases to the payee at least ten days before maturity or payment date of bonds or interest." Acts of Arkansas, 1927, pages 18 & 19.

ARGUMENT.

Before discussing this cause on its merits, we wish to present the questions raised by motion to dismiss and feel that such motion is well taken and under the practice of the State of Arkansas and the repeated decisions of the U. S. Supreme Court, said motion to dismiss should be sustained and petitioner's bill dismissed.

MOTION TO DISMISS.

Respondent's motion to dismiss should have been sustained without a trial of this cause on its merits.

Under the Original Act of 1915, Section 7, any property owner aggrieved by the assessment of benefits could complain to the board of assessors to obtain a correction of any assessment, an appeal was granted to be taken within thirty days by the property owner from the action of the assessors to the commissioners of the road district and an appeal then allowed from the decision of the commissioners to the county court, such appeal to be taken within thirty days.

Under the Amendatory Act of 1917, Section 6. In case of reassessment of benefits, the board of assessors should meet and hear the complaints of property owners and increase or decrease their assessment in accordance with the benefits to be received. Any property owner aggrieved by the action of the assessors could appeal to the commissioners, such appeal to be taken within thirty days.

Although under the last act no specific authority to appeal from the assessment of road commissioners was granted, yet such authority is granted under the Constitution and laws of the State of Arkansas. In a matter involving the adjustment of the proportion of an indebtedness to be assumed by two counties, the commission appointed by the Legislature made the decision and though no right of appeal was specifically

granted, the Arkansas court held such right of appeal to exist under the Constitution. *Phillips County* v. *Lee County*, 34 Ark., page 243. Such has been the consistent holding of the Arkansas courts, even though the appeal is from a special proceeding authorized by the Legislature. See *Missouri Pacific Railroad Co.* v. *Conway County Bridge Dist.*, 134 Ark., page 297, and cases there cited.

The pipe line company, under the above acts, had a complete remedy meeting all requirements of the due process clause of the Fourteenth Amendment of the U. S. Constitution, and having failed to pursue the remedy provided, cannot now, after a delay of more than seven years bring this action in equity to obtain a review and avoidance of the assessment of benefits.

In an Arkansas case, after citing from the *State* v. *Railroad Tax Cases*, 92 U. S. p. 609, to the effect that where a party aggrieved has a judicial tribunal before which he may appear for the correction of such grievance, he must pursue such remedy, the court held:

> "Due process of law," said Judge Field in *Railroad Tax Cases*, 13 Fed. Rep. 752, "is deemed to be pursued, when after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity at a time and place to be designated to be heard respecting the correctness of the assessment and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient if the time and place of hearing be designated by statute." This is the established rule. Cooley on Tax, (2nd Ed.) 364-5, and cases cited there and *supra*.

> And where an adequate remedy in the nature of an appeal is provided, as is done in our statute, the better opinion is that a mere error of judgment on the part of the board or a mistake in their conclusion, though arrived at without evidence where evidence is required, is not available in a collateral issue. The tax payer must pursue the remedy provided for his relief or abide by the finding of the board.

citing various cases from Arkansas and other states to support its holding; also stating:

> "Great mischief would follow in permitting the taxpayer to select arbitrarily his own time and tribunal to test the correctness of an assessment."
> *Board of Equalization Cases*, 49 Ark. p. 533.

In a later case the court reaffirmed the law as laid down above, holding:

> "The jurisdiction to fix this valuation is by legislation ordinarily placed with some officer or board; and boards or courts of revision are sometimes established. But the entire proceedings are statutory, and the statutory remedies provided to a party aggrieved by an over-valuation made within the jurisdiction of the particular officer or board must be pursued. As is said in the case of *Stanley* v. *Supervisors of Albany*, 121 U. S. 535: 'A party who feels himself aggrieved by overvaluation of his property for purposes of taxation and does not resort to the tribunal created by the state for correction of errors in assessment cannot maintain an action at law to recover the excess of taxes paid beyond what should have been levied on a just valuation.'"
> *Clay County* v. *Brown Lumber Co.*, 90 Ark. p. 417.

In a late case which has recently been affirmed by the U. S. Supreme Court, the Arkansas Supreme Court held:

"The third and fourth grounds of attack may be considered together. The court sustained a demurrer to that portion of the complaint which attacked the assessments on the grounds that they were made under a mistake of fact, and that there was a discrimination in favor of, or against, certain property owners. This action of the court must be affirmed, for there must come a time when such questions are foreclosed. It was upon the faith of these assessments that the district incurred obligations and issued negotiable bonds with which to pay them, and these bonds are owned by the investing public through the United States. The act expressly names the time when these questions are foreclosed, and that time is ten days after the completion of the hearing on the assessments by the commissioners, except as against property owners who, within that time, have applied to the chancery court for relief.

"We have in many cases upheld this limitation upon the time within which property owners may complain. The recent case of *Pierce* v. *Drainage District No.* 17, 155 Ark. 89, collects a number of them. This question was very thoroughly considered by us in the recent case of *Road Improvement Dists. Nos.* 1, 2 *and* 3 v. *Crary*, 151 Ark. 484, in which a very similar attack was made on an assessment of benefits. There the assessment had been made according to the zone system, which was said to be arbitrary and unreasonable, but we answered that and other objections to the assessment as follows: 'We have often decided that the method provided in the statute for attacking the validity of the assessment of benefits is exclusive, and that it must be pursued within the time prescribed by the statute. In other words, it

has been settled by repeated decisions of this court that a collateral attack cannot be made upon the assessment of benefits unless void on the face of the proceedings. *Reitzammer* v. *Desha Road Imp. Dist.*, 139 Ark. 168; *Summers* v. *Conway & Damascus Road Imp. Dist.*, 139 Ark. 277; *Nettles* v. *Hazelwood Road Imp. Dist.*, 144 Ark. 632; *Sikes* v. *Douglas*, 147 Ark. 469."

House v. *Road Improvement Dist. No.* 2, 158 Ark. p. 344.

The decisions of the U. S. Supreme Court on this question are thoroughly in accord with the citations heretofore given from the Arkansas Courts.

An assessment for park purposes was made by the supervisors sitting as a board of equalization of the City of Denver, due notice having been given to the land owners to appear and except to any assessment. The Colorado courts had held that the statute in question gave the interested parties full authority to be heard, and having failed to appear, they could not thereafter raise the question as to whether their property had been benefited in the amounts found by the board of equalization. The U. S. Supreme Court held itself bound by the decision of the Colorado court as to the meaning of said statute and held that the due process clause to the Constitution had been complied with.

"The full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself therefor, is clear of all constitutional faults."

Plaintiffs in error did not avail themselves of the privilege of a hearing, as provided by this sec-

tion, but after the assessing ordinance had been passed, began this proceeding in the district court to test the constitutionality of the law. As we have said, the question as to what should be a proper construction of the charter provision was not for our decision; that matter was within the sole authority of the state court, and was disposed of, as the Supreme Court of Colorado held, by the former cases reported in 33 Colo. and by our decision based upon that construction in *Londoner* v. *Denver*, 210 U. S. 373, 52 L. Ed. 1103, 28 Sup. Ct. Rep. 708. As the plaintiffs in error had an opportunity to be heard before the board duly constituted by par. 300, they cannot be heard to complain now. It follows that the judgment of the Supreme Court of Colorado must be affirmed.

Fawnwood v. *City & County of Denver*, 252 U. S. p. 12.

The above case was referred to and sustained in a later case going up from the State of Colorado where it was held that the property owners who failed to appear before a tax commission to object to a tentative *ad valorem* basis for assessment for public improvements cannot complain before the courts of the adoption of such basis on the ground of its unconstitutionality. *Millheim* v. *Moffatt Tunnel Improvement District*, 262 U. S. p. 712.

In a later case involving the identical question here raised, the U. S. Supreme Court held itself bound by the construction of the state court of a state statute in reference to the remedies of tax payers for relief from an excessive assessment, and further held that the failure to seek relief from an alleged unequal tax from the proper board cannot be excused because

no appeal to a judicial tribunal was provided in case of the rejection by said board of the party's complaint; and the supreme court further held that although it was alleged that the time for hearing complaints was inadequate, yet the court will not assume that the proper relief would not have been granted; and finally holding that a tax payer must exhaust his available legal remedies before the administrative board before resorting to courts to enjoin the enforcement of an unequal tax.

In said case as stated, in the opinion, the fact was found that the banks as assessed were compelled to pay upon valuation grossly in excess of that put upon other property in the county, but since they had not pursued the remedy provided under the statute, no relief could be afforded.

> "Plaintiff not having availed itself of the administrative remedies afforded by the statutes, as construed by the state court, it results that the question whether the tax is vulnerable to the challenge in respect of its validity upon any or all of the grounds set forth, is one which we are not called upon to consider. The judgment of the district court is accordingly affirmed."
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> *First National Bank* v. *Board of County Commissioners*, 264 U. S. p. 456.

In the last case on this subject, suit was brought to enjoin as unconstitutional the collection by the State of New York of the annual franchise tax paid upon net income. The New York statute provided that a dissatisfied tax payer might within one year apply to the tax commission for a revision and reassessment according

to the law and facts. The plaintiff did not apply to the commission, but within the year brought this suit; referring to the case next above cited, the U. S. Supreme Court held:

> "A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax, cannot thereafter be heard by a judicial tribunal to assert its invalidity (citing cases) * * *
>
> The company, however, made no application to the commission for a revision of the tax; it submitted no evidence to the commission as to any of the matters on which it now relies, either as to the inclusion of profits derived from the munitions business or otherwise; and it did not request the commission to resettle the tax on the ground of any error or invalidity, in matter either of fact or law.
>
> Under these circumstances we think that the company, having failed to avail itself of the administrative remedy provided by the statute for the correction of the tax was not entitled to maintain a bill in equity for the purpose of enjoining its collection."
>
> *Gorham Manufacturing Co.* v. *State Tax Commission of New York*, 266 U. S. p. 265.

"It is urged further that it would have been futile to seek a hearing before the state tax commission because, first, *no appeal to a judicial tribunal* was provided in the event of a rejection of a taxpayer's complaint; and, second, because the time at the disposal of the commission for hearing individual complaint was inadequate. But, aside from the fact that such an appeal is not a matter of right, but wholly dependent upon statute (2 Cooley, Taxn., 3d Ed., p. 1393), we cannot assume that, if application had been made to the commission, proper relief (455) would not have been accorded by that body, in view of its statutory authority to receive complaints and examine into all cases where it is alleged that property has

been fraudulently, improperly, or unfairly assessed. *Collins* v. *Keokuk*, 118 Iowa, 30, 35, 91 N. W. 791. Nor will plaintiff be heard to say that there was not adequate time for a hearing, in the absence of any effort on its part to obtain one."

First National Bank v. *Board of Commissioners*, 264 U. S. pages 454-455.

We quote below the syllabus of two cases decided by the Circuit Court of Appeals of the Eighth Circuit, both holding that suits in equity attacking road assessments must be dismissed and the aggrieved tax payer must follow the method provided by the statute.

"Road Law Ark. (Acts 1913, p. 882), par. 13, provides that the findings of a county court, fixing the assessments of benefits or damages on account of the building of a road, shall have the effect of a judgment against all property in the district, and that any landowner may appeal therefrom to the circuit court. The general laws of the state provide for appeals from the latter court to the supreme court of the state. *Held* that a federal court of equity is without jurisdiction of a suit by a landowner to enjoin enforcement of such an assessment, where the jurisdiction of the county court to make it is not questioned; the remedy at law being plain, adequate, and complete."

"The law of Arkansas, as established by the decisions of its supreme court, does not give a court of equity jurisdiction to enjoin collection of a tax based on an excessive or erroneous assessment, where the statute provides an adequate remedy by appeal from the assessment."

McLaughlin et al. v. *St. Louis Southwestern Ry. Co.*, 232 Fed. p. 579.

"A provision of Road Laws Ark. 1919, vol. 1, p. 387, par. 5 for an appeal by a landowner, deeming himself aggrieved by the assessment of his lands, to the chancery court, with right of appeal to the supreme court, provides an exclusive method for review of assessments for a highway, so that

suits in equity attacking the assessment must be dismissed."

Missouri Pacific Ry. Co. v. *Conway & Vilonia Road Dist.*, 280 Fed. p. 401.

It will be noted that the administrative remedy granted by the statute is ample and complete. Any taxpayer who felt that his assessment was unequal and unjust or who felt that the assessment of other property was such as to place an additional burden on his own property, was given by the statute, notice of the time, place and date of hearing and given an opportunity to file objections so as to seek a correction of the taxpayers' assessment or to have the amount of any other taxpayer, if unequal, adjusted and under the statute opportunity was given for introduction of evidence at a public hearing by any aggrieved taxpayer.

If not satisfied with the action of the Board at such hearing, the taxpayer had an opportunity, under the statute to appeal and finally to carry his cause through the courts.

As the petitioner did not avail himself of such remedies but instead paid the taxes for three years, and then brought the present action, we feel that under the decisions heretofore cited petitioner's bill should be dismissed.

Petitioner's pipe line laid under and across land on a right of way owned by defendant is real estate.

The form of right of way deed used by the pipe line company appears in the record at page 95, and under same an exclusive right of way for the purpose of laying pipe lines and telephone lines is granted for all time with a right to lay such additional lines as the company might find advisable or necessary.

The trial court did not make any finding that the pipe line company property is personal property, basing its decision on other grounds, evidently being convinced

that said pipe line company property is real estate in accordance with the Arkansas decisions.

Under the original act, creating the road district passed during the year 1915, Section 7, the Commissioners are required to assess benefits against the real property and also railroads, street railroads, telegraph, telephone and pipe lines and all other franchises connected with the realty in the district, the assessment of said property to be made by the mile. In accordance with Section 6, of the Amendatory Act of 1917, the assessment of benefits is to be made in case of a reassessment of benefits against the same property detailed in Section 7 of Act of 1915. There is thus a distinct finding and holding of the Arkansas Legislature that the pipe line company's right of way, with the appurtenances thereof, is real estate.

As the decisions of the Arkansas Supreme Court are uniform that the pipe line and right of way are real estate, the Federal Courts are bound to follow the decision of the State Court as to what constitutes real estate and the legislative classifications of the property which has been approved by the state courts will not be interfered with by the Federal courts where the evidence does not show that it is arbitrary, capricious, and confiscatory. *Farcomb* v. *City and County of Denver*, 252 U. S. page 8. *Millheim* v. *Moffatt Tunnel Improvement Dist.*, 262 U. S. page 717.

This question has several times been before the Arkansas Supreme Court and it is now settled that the ownership of a right of way for a railroad, street car line, telegraph and telephone lines and pipe lines, with the property placed on such right of way, is the ownership of real estate, not personal property.

This was first decided in a case where an interurban street car line owned trackage rights over the streets of the City of Fort Smith, and tracks outside the city limits. Where a right of way was owned, the tracks were held real estate subject to local assessment. Within

the city only a franchise was given to use the streets or grounds and no easement or freehold interest in the soil, and the tracks were held to be personal property. *Fort Smith Light & Traction Co.* v. *McDonough,* 119 Ark., page 258.

In a later case a railroad company was assessed to build a bridge across the Arkansas River. The legislative act provided that in addition to the benefits accruing to the land the assessor should value the benefits which will accrue to the railroads, telephone and telegraph lines and other power lines and also pipe lines. There as here, it was alleged, that the Legislature had no power to authorize local assessments levied against such properties. The court decided that the Legislature did have such power, holding

> "There has been much diversity of opinion as to whether or not the right of way of such lines received any benefit from a local improvement, but we are of the opinion that they may be included in the district for the same reason that is generally given in cases of the right of way of railroad companies. Of course the amount of benefits would be a question of facts to be determined by the board of assessors."
>
> *Missouri Pacific Railway Company* v. *Conway County Bridge Dist.,* 142 Ark. p. 11.

In the case of a pipe line company, the assessment of benefits against the pipe line in the country where the right of way was owned, was held to be permissible, but within the city limits of Hope, where the pipe line was laid under the streets, the court held the pipe line to be personal property, drawing the distinction be-

tween the ownership of right of way and the mere license to lay pipes under a franchise granted by a city. *Arkansas Natural Gas Co.* v. *Commissioners*, 142 Ark. page 352.

In a later case a telegraph company was granted a right to use the right of way of a railroad company, under an agreement, that after the expiration of twenty-five (25) years, the contract might expire on one (1) year's notice, being given by either of the companies, but without a clause in the contract requiring the removal of the telegraph lines. In this instance there was a right of way granted over a right of way owned for railroad purposes by the railroad and granted for a term specified of twenty-five years.

Under the legislative act creating the road district, they were required to assess not merely the land, but the railroad, tram roads, telegraph and telephone and pipe lines and other improvements on real estate that will be benefited by the building of the roads. The contention was raised by the telegraph company just as has been raised by the pipe line company in this case, that in certifying out for assessment for county and state purposes, the telegraph line, they had been certified as personal property and that the tax commission had not assessed any part of the land and property of the telegraph company as real estate.

The Arkansas court held; that although the contract between the telegraph company and railroad company was for only twenty-five years, all the facts and circumstances showed that it was intended as a permanent not a limited occupancy or easement, and that

being such a permanent easement, the property of the telegraph company is real estate and the commissioners of the road district had a right under said act of the legislature to assess benefits against it. *Western Union Tel. Co.* v. *Road Dist. No.* 1, 144 Ark. p. 479.

In a case carried by the present petitioner to the Arkansas Supreme Court in an endeavor to avoid the payment of local assessments, it was decided that the very right of way and pipe line at issue in this cause is real estate and subject to local assessment as real property. See *Standard Pipe Line Co. Inc.* v. *Index-Sulphur Drainage District*, 173 Ark. p. 372.

Petitioner claims that its right of way and pipe lines are not sufficiently described so they may be identified for tax purposes.

Petitioner paid the assessments for road purposes for three years and then brought an action to be allowed to pay county and state taxes on its right of way and pipe line without paying such road taxes.

Petitioner had certain correspondence with the tax collector's office about its delinquent road taxes before paying same and after corresponding, did pay such taxes, so it appears that the description was ample to identify the property and petitioner knew what property was and is subject to road taxes.

To prevent the opportunity of any property escaping taxation because of a mis-description or clerical misprision under the original act of 1915, Section 13, R. 206, it was provided that this law shall be liberally construed to give the assessment and tax lists the

effect of a first mortgage and lien against the property. It was further held: "Provided that no informality or irregularity in holding of any meeting or the assessment of the land, or the names of the owners, or the number of acres, shall be a valid defense to an action for taxes" (R. 206).

"Also under Section 8 (R. 201), it prescribed that railroads, rights of way, pipe lines, telegraph and telephone lines and all other franchises connected with the realty shall be assessed according to the betterments and increase in value in like manner as herein prescribed for real estate, except said assessment shall be made per mile and no error in the name and residence of the owner or *the description thereof* shall invalidate said assessment if sufficient description of the property sought to be taxed is given to ascertain where it is situated."

In order that any mis-description or clerical misprision on the assessment roll might be corrected, Section 15 of the original act of 1915 (R. 207), and Section 14 of the amendatory act of 1917 (R. 222), are the same and as follows:

> "In the event the description of any lot, tract or parcel of property upon the list of the assessment hereinbefore provided to be made, shall for any reason be uncertain, indefinite or insufficient, then in any suit brought to enforce the payment of any assessment, the court shall have the power to correct such description and enforce the collection of any assessment due thereon, having due regard for the rights of any parties who may have intervened."

The assessment levied against the value of the pipe lines in the drainage district does not violate the Interstate Commerce clause of the Federal Constitution.

If the contention that no assessment for a local improvement can be laid against a pipe line because it is engaged in Interstate Commerce and such an assessment would place a burden on such commerce, could be seriously entertained, then no railroad, telegraph line, pipe line or other corporation or individual engaged in Interstate Commerce could be made to pay taxes for streets, roads, levees, ditches or other local improvements.

The claim is made that even though benefited by a local improvement, the Pipe Line Company cannot be required to pay for said benefits because its business is largely or solely one resulting in Interstate Commerce.

The cases cited in the *Standard Pipe Line Co.* v. *Index-Drain. Dist.*, 173 Ark. p. 372, *Northern Pacific Railway Co.* v. *Richland County*, 28 N. D. p. 172, Ann. Cas. 1916E and cases cited on page 579. *Illinois Central Railway* v. *Decatur*, 147 U. S. p. 190, seem decisive of the question.

The other cases cited show the distinction between taxes on property which is used in Interstate Commerce, such as the tax at issue, and taxes upon the act of Interstate Commerce. *Cleveland Railway Co.* v. *Bachus*, 154 U. S. p. 439. *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. p. 194.

This court held:

"A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the 14th Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction, although devoted to Interstate Commerce."

Union Tank Line Co. v. *Wright*, 249 W. S. p. 275.

In a case where similar claim was made in reference to a railroad company, the objection based on the commerce clause of the constitution was abandoned by the counsel for the railroad on appeal to the U. S. Supreme Court. *Kansas City S. R. Co.* v. *Road Improvement Dist. No. 3*, 266 U. S. p. 386.

See also:

Postal Telegraph-Cable Co. v. *Adams*, 155 U. S. 688.

Alpha Cement Co. v. *Massachusetts*, 268 U. S. 203.

Union Tank Line v. *Wright*, 249 U. S. 275 at 282.

American Mfg. Co. v. *St. Louis.*, 8 Fed. (2d) 477."

Miller County Highway & Bridge District v. *Standard Pipe Line Co., Inc.*, Fed. Reporter, 2nd Series of Vol. 19, p. 3.

A state may impose a tax upon the value at the well of natural gas produced within its limits, although the gas is transported into other states for consumption.

Hope National Gas Co. v. *Hall*, 274 U. S. p. 286.

Land may be classified for road assessment purposes as rural and urban; and railroad, telegraph, telephone and pipe lines may be assessed by the mile.

The zoning system for assessment of benefits in road districts has been uniformly adopted in Arkansas in the rural districts, and the assessment of city property has usually been a certain percentage of its assessed value. Public utilities are assessed by the mile, taking into consideration the benefits to be received from same and such system has been upheld by the Arkansas courts.

> "Appellants next contend the classification of the property adopted by the board for the assessment of benefits was discriminatory against the various property owners. They adopted an acreage basis for rural property, a valuation basis for city property, and a mileage basis for railroads, telegraph, and telephone. A classification of the various kinds of property as a basis upon which to assess benefits has been approved by this court as feasible and practical."
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> *Oates* v. *Cypress Creek Drainage Dist.*, 135 Ark. 155.
>
> *Bulloch* v. *Dermott-Collins Rd. Imp. Dist.*, 155 Ark. p. 183.

The above was the system used in the road district attacked in the case of *Kansas City Southern Railroad* v. *Road Improvement District No. 3*, 156 Ark. p. 117, and affirmed on appeal by the U. S. Supreme Court, 266 U. S. p. 379.

Notice Published of Assessment of Benefits.

The testimony shows conclusively that notice of the filing of the assessment roll was given by publica-

tion as required by law granting the owners at least thirty days within which to appear and except to their assessment. Such notice complied fully with the due process clause of the U. S. Constitution and it was not necessary that actual notice be given to each separate land owner in the district. According to the evidence, the road was built immediately adjoining the pumping station and general headquarters of the pipe line company, and they of necessity used the road, saw same and knew of its construction. The testimony also shows that one Mr. Hillford, the superintendent in charge of the company's affairs in Miller County, Arkansas, who was in daily communication with the home office through a private telegraph wire, knew about the assessment for road purposes and discussed same with George Conway, one of the assessors who had an office adjoining that of Hillford. The Pipe Line Company also had actual notice of the assessment of benefits, see letters to and reply from petitioner's tax commissioner (Exhibits, R. 75 to 77). The assessment being *in rem* against the property itself notice thereof by publication fully complied with the constitutional requirements.

Four weeks' notice was held to be adequate time to afford due process of law where land was sold for levee taxes, and referring to lands owned by non-residents, the U. S. Supreme Court held:

> "It should be kept in mind that the laws of a state come under the prohibition of the 14th Amendment only when they infringe fundamental rights. A law must be framed and judged of in

consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises."

Ballard v. *Hunter*, 204 U. S. p. 262.

The time limit set by the statute, within which objections to an assessment for road purposes, could be made, was upheld by the Arkansas Supreme Court in *House* v. *Road Improvement District No.* 2, 158 Ark., page 344. On appeal the U. S. Supreme Court held that the statute allowed twenty-eight days from the first publication of the notice within which the petitioner could have objected to the assessment, holding as follows:

"Accepting the statute as construed by state courts the suggested objection to its validity appears to us wholly wanting in merit."

House v. *Improvement District*, 266 U. S. p. 177.

As in the Bullard case above cited, House was a non-resident of the state. See also *Larimy Land Co.* v. *Hoffman*, 268 U. S. p. 279.

The ratification and confirmation of the assessment of benefits by Acts of 1917 and 1925 was a legislative assessment, and is binding upon the property owner unless absolutely arbitrary, unreasonable and absurd.

> "It is next insisted that the Legislature had no power to validate and confirm the assessments which had theretofore been made by the commissioners. Unless the assessment was arbitrary, the Legislature had the power to confirm and validate it. The Legislature had the power in the first instance to have levied the assessment subject only to the right of the land owner to have an arbitrary abuse of that power reviewed by the courts, and it can therefore adopt as correct the assessment made by the commissioners as a reassessment by the Legislature. *Coffman* v. *St. Francis Drainage District*, 83 Ark. 54, and *Davies* v. *Chicot County Drainage Dist.*, 112 Ark. 357."
>
> *Gibson* v. *Spikes*, 143 Ark. p. 274.
>
> "An affirmance of the judgment in this case might be rested entirely on the confirmation of the assessments by the statute cited above. There is no reason shown why the statute is not applicable, for we have decided that, *even during the pendency of litigation*, a statute may be enacted ratifying and confirming assessments. *Sudberry* v. *Graves*, 83 Ark. 344; *Tims* v. *Mack*, 147 Ark. 112; *Gibson* v. *Spikes*, 143 Ark. 270; *Burr* v. *Drainage District*, 145 Ark. 55; *Payne* v. *Road District*, 149 Ark. 491."
>
> *Kansas City Southern Railroad Co.* v. *Road District No. 3*, 156 Ark. p. 118.

In which last case the U. S. Supreme Court in affirming the decision of the state court held as follows:

> "The special confirmatory act was recognized by the supreme court of the state as a legislative determination of the lands which will be benefited, and of the proportions in which they will share in the

benefits. It therefore must be treated here as an admissible legislative assessment of benefits so far as the state constitution is concerned."

Kansas City S. R. Co. v. *Road Improvement Dist. No.* 3, 266 U. S. p. 379.

Among other cases cited as supporting their holding that the finding of the legislature as to benefits is conclusive the U. S. Courts quote approvingly from *Spencer* v. *Merchant*, 125 U. S. 345.

This leading case on this subject has settled for all time that a legislative finding of benefits is conclusive on the courts, state and federal and does not violate the 14th Amendment to the Constitution, unless such legislative determination is palpably arbitrary and therefore a plain abuse of power.

Of the total benefits assessed for road purposes, $6,687,178.00; $60,000.00 in benefits was assessed against the pipe line company, about 9/10 of 1% of the total assessment of benefits.

On said amount during the twenty year period through which the bonds run if the maximum of ten mills per year had been levied, $600.00 per year, $12,000.00 total would be collected in road taxes. However, as shown by the testimony, the maximum has been collected for only four years and the average will probably be less than $500.00 per year to be paid by the pipe line company.

The method in Arkansas of determining benefits received by property in improvement districts.

We quote below from a few of the Arkansas decisions showing that the courts have never attempted to

substitute their opinion and judgment for that of the Legislature or of the assessors appointed to distribute benefits. The Arkansas courts following the rule laid down by various decisions of the U. S. Supreme Court have consistently refused to hold said assessments invalid unless of such a nature as to be so palpably arbitrary as to be shocking to one's ideas of right and justice.

> "The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so; and may settle both questions for itself, and when it does so, its action is necessarily conclusive and beyond review * * * No hearing would open the discretion of the Legislature, or be of any avail to review or change it. * * * The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers."
>
> *St. Louis & S. W. Ry. Co.* v. *Grayson,* 72 Ark. 127.

The St. Louis Southwestern Railway Company claimed that its railroad track running through Red River Levee District No. 1 had not been benefited by the building of the levee, and proved by its witnesses that the track was above overflow. The court found from the testimony of witnesses who professed to know, that the building of the levee was calculated to result in, and did result in benefit to the track. The court further found:

> "It is not necessary that it should receive absolute protection from overflow, or that it should have been entirely without protection and subject

to inundation before the levee was built. Whether it was benefited to an extent equal to that of other property in the district, we do not consider it necessary to determine. That was a matter largely for legislative determination in fixing the boundaries of the district and providing for the method of assessment of taxes. That was a matter for legislative inquiry and determination, and that the courts must respect such determination, it is settled in so far as it can be done, by a decision of this court in the case of *Railway Company* v. *Grayson*, 72 Ark. 119, and that decision is in accordance with the authorities generally."

After finding that the assessment of the property shall be according to the value as appraised for state and county taxation, the court found that such method of estimating the benefits is not arbitrary or unreasonable, and that the Legislature might assume that benefits would accrue in proportion to the assessed value of the property, *St. Louis S. W. Ry. Co.* v. *Board of Directors*, 81 Ark. 566.

In a case attacking the validity of assessments in an improvement district, after citing the cases heretofore quoted, this court quoted approvingly from "Cooley on Taxation."

> "It has been repeatedly decided that the legislative act of assessing districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying a court that no special and peculiar benefits are received."
>
> *Board of Improvement District* v. *Offenhauser*, 84 Ark. 268.
>
> "But such fraud or demonstrable mistake can occur only when the assessments are levied on lands

entirely regardless of the benefits and by reason of a manifest prejudice against the owner, or in a total and reckless disregard of his rights. If the property is benefited to any extent by the improvement, then it can be included in the district, and the mere fact that the benefit assessed against it was exorbitant or excessive, would not invalidate the assessments thereof.

Nor will it be sufficient to show by a preponderance of the evidence only that the property was not benefited by the improvement. If it appears from any substantial testimony that the property receives any benefit from the improvement, then the assessment thereof made by the board cannot be invalidated by the court.

In the case at bar, while the chancellor found that the property of the defendants was not benefited by the improvement, and his finding is sustained by a preponderance of the evidence, nevertheless there was substantial testimony adduced upon the part of the plaintiff showing that the property received actual benefits from improved sanitation and it could be connected with the sewer system so as to successfully drain the sewage from this property and thereby receive benefits. Under such circumstances, the assessment made by them cannot be invalidated or set aside in this proceeding."

Board of Improvement v. *Pollard*, 95 Ark. 552.

"In the case of *Salmon* v. *Board of Directors of Long Prairie Levee District*, the court found that the benefits were anticipated and estimated in advance, and if such benefits did not accrue, the land, nevertheless, was required to pay in proportion to the benefits levied by the Legislature.

"The legislative branch of the government is, as we have said in several cases, the sole judge in the matter of creating improvement districts of this character, in establishing the boundaries thereof and in determining or in providing means

for determining the amount of assessments based on benefits, and the courts will not interfere, unless an arbitrary and manifest abuse of the power is shown. Mere mistakes of the lawmakers, or of those impowered by the lawmakers to make assessments, in fixing the amount or rate of assessments, will not be reviewed and corrected by the courts. There is no merit in the contention that the appellant's lands cannot be taxed because the levee was not properly constructed, or because it has caved away, so that it no longer affords protection from overflow. The anticipated benefits were estimated in advance and the assessments were levied accordingly and the fact that the benefits have not been fully realized affords no avenue of escape from payment of assessments to defray the cost of improvements."

Salmon v. *Board of Directors,* 100 Ark. 369.

The City of Clarendon assessed benefits against the railroad track of the St. Louis Southwestern Railway Company for an improvement district for laying water mains throughout the city. The railway company resisted, claiming that the assessment against their track was arbitrary and unreasonable, which contention was upheld by the chancellor. In reversing the chancellor and upholding the assessment, this court held:

"When the assessment of the benefits arising from and the proportionate cost of a local improvement has been made upon the property specifically benefited thereby, by the proper officials in the manner prescribed by law, it devolves upon the party attacking same to show that the amount of these assessments is excessive or unequal. It has been held that the amount of the benefits which such officials have found and determined to accrue to each lot and parcel of property in a dis-

> trict by reason of the improvement, will be presumed to be correct and just and the courts will not disturb same until the contrary has been shown by the evidence. Such evidence must consist not *merely of opinions that the assessments are excessive,* but of facts which will overturn the *prima facie* fairness and equality of the assessment established by the returns of the assessors."
>
> *Improvement District No.* ..... v. *St. Louis, S. W. Ry. Co.*, 99 Ark. 521.

The legislature created Levee District No. 2 in Jackson County, Arkansas, and included within the district part of the railroad track and right of way of St. Louis, Iron Mountain & Southern Ry. Co. The railway company refused to pay taxes, claiming not only that it received no benefit, but setting forth the fact that it was actually damaged by the building of the levee, and introduced the testimony of its engineers as experts to show such damage. This court quoted with approval the excerpt from "Cooley on Taxation" that we have heretofore set forth at length, and in referring to the contention of plaintiff that it would not be benefited but damaged by the construction of the proposed levee, this court held:

> "After the legislature has determined that a certain area which it has organized into an improvement district will be benefited by the improvement, it is not a question for the courts to determine, upon a preponderance of the evidence, as to whether or not the legislative judgment has been properly exercised. It is only an arbitrary and manifest abuse of power of the legislature in

creating improvement districts that will be reviewed by the courts."

St. Louis Iron Mountain and Sou. Ry. Co. v. *Board Directors of Levee District*, 103 Ark. 134.

The St. Louis & San Francisco R. R. Company refused to pay assessments for the Ft. Smith & Van Buren Bridge District, claiming that the bridge was not a benefit, but an actual detriment to its property, in that traffic would be diverted from the railroad and bridge of the railway company. Although it was shown that the earnings in freight traffic had decreased since the bridge was put into operation, yet the court held this might be accounted for because of poor crops; that future benefits are, to a certain extent speculative, and that the estimated growth of population, because of the building of the bridge, might reasonably be expected to increase the traffic of the railroad, even with the competition, as it is impossible to find an exact standard for benefits to accrue in the future, and since there was some testimony showing that benefits had been received, the assessment was upheld, the court holding:

"The assessment of future benefits is largely a matter of estimate, and, to some extent, speculative. As was stated by Justice Holmes in the case of *Louisville & Nashville Ry. Co.* v. *Barber Asphalt Co.*, 197 U. S. 430, 'the amount of benefit which an improvement will confer upon particular land, and indeed, whether it is a benefit at all, is a matter of forecast and estimate, and on the question of benefits, the present use is simply a prognostication and plea of prophecy.'"

"We must depend largely upon the opinions of men of sound judgment and reasonable information on the subject, to determine what the future benefits will probably be. If it were necessary to find an exact standard, a measure of benefits in advance would be impossible. That view of the matter would necessarily lead to the conclusion that benefits must be enjoyed before there can be an assessment to pay for the improvement, which would be a contradiction in itself.

The question of the legal sufficiency of the evidence is all that we need to pass upon, and we are of the opinion that there is competent testimony of a substantial nature sufficient to base the finding upon as to the amount of benefits fixed."

St. Louis & S. F. Ry. Co. v. *Bridge Dist.*, 113 Ark. 496.

In an improvement district case, going up from Texarkana, after citing numerous cases heretofore quoted, the court held:

"We have decided in numerous cases that a legislative ascertainment that benefits from a local improvement accrue in proportion to the value of the property benefited will be respected unless it be demonstrated to a certainty that a mistake has been made."

Board of Improvement v. *S. W. Gas & Electric Co.*, 121 Ark. page 110.

In a case involving assessments for highway purposes, where the legislative act creating the district had set forth the lands that would be benefited, it was asserted that said act is void as containing a legislative finding that certain lands will be benefited by the proposed road, whereas this is a judicial and not a legis-

lative question. The court answered this contention as follows:

> "It is always a question of fact, and, in a large measure, a matter of opinion, as to what lands will be benefited by a particular improvement. Reasonable minds may, and do differ on this question, and that difference continues to exist when the question of the amount of benefits is reached. Some one must be authorized to decide these questions, for it is inconceivable that there should ever be, or could ever be, a unanimity of opinion upon a subject affording so wide a scope for difference of opinion. The legislature has control of this subject, and it may appoint such agencies to make these findings as it sees proper to create, or it may make the findings on its own account, and when these findings have been made and have been properly declared in the recitals contained in legislative enactments the courts are bound thereby except for arbitrary or obvious and demonstrable mistakes. A number of cases have thus announced the law and what we have just said disposes of the last recited objection of the *Amici curiae*, that the question of benefits is a judicial, and not a legislative question. Indeed, it is conceded that this court has frequently so decided, and we decline to overturn this line of cases."
>
> *Cummock* v. *Alexander*, 139 Ark. 157.

In upholding an assessment of benefits for bridge purposes against a railroad, where the testimony that no benefits would be received was that only of the railroad employes, the Arkansas Supreme Court upheld said assessment using the following language:

> "No attempt was made to prove fraudulent, or capricious or arbitrary action on the part of any officials in making the assessment, the only evidence upon the subject being the opinions of

four employes of the company that the improvement of the road would not benefit the railroad property, and if inequality has resulted from the application of the state law in a customary manner to a situation frequently arising in our country, it is an incidental inequality resulting from a valid classification of railroad property for taxation purposes which does not fall within the scope of the Fourteenth Amendment, which was not intended to compel the states to adopt an iron rule of equal taxation."

It follows that the decree will be affirmed.

Mo. Pac. Rd. Co. v. *Conway County Br. Dist.*, 142 Ark. p. 14.

In the case of *House* v. *Road Improvement District No.....* in which the Arkansas Supreme Court decision has been affirmed by the United States Supreme Court, the legal points involved are almost identical with those in the present case.

The road district was formed by special Act of the Legislature, which designated the territory that would be benefited by the improvement, and the commissioners appointed assessed the benefits against the lands in the district. Mrs. House, a non-resident living in Washington, D. C., brought suit claiming that the assessments against her lands were void as being discriminatory as said lands do not receive any benefit from the roads. She also claimed just as is claimed here, that she had no actual notice of the act creating the district, of the building of the roads, or of the assessment against her land, and that the published notice giving parties aggrieved the opportunity to appear before the commissioners and object to the assess-

ment did not give such notice as is required by due process of law.

Both of said contentions were decided in favor of the district and the court stated:

> "This language is too broad for its meaning to be mistaken. The landowner was given an opportunity, if he desired it, to appear and complain before the commissioners about his assessments, or, if he preferred, he might wait until the commissioners had passed upon the assessments and then appeal to the chancery court, and in either case he was entitled to an original *de novo* hearing. It was not necessary that he formally make himself a party to the proceedings. He was made a party by the act itself, and, unless he appeared before the commissioners and was heard by them, he waived the right to that hearing; and if, at the conclusion of the hearing by the commissioners, a hearing by the chancery court was not invoked, the assessment became final and binding."
>
> Citing *Coffman* v. *Road Improvement Dist. No. 6, Laurence County*, 134 Ark. 411.
>
> *House* v. *Road Improvement Dist. No.* 2, 158 Ark. p. 339.
>
> "Here the Legislature created the district and defined its boundaries. Appellant's lands were placed in the district by the action of the General Assembly itself, which was a legislative determination that those lands would be benefited by the proposed improvement of the highways within the district; and, after doing this, the act provided that the commissioners should determine the assessment of benefits and damages against the respective tracts of land in the district, and should determine, as an administrative matter, the per cent of these betterments to be levied and collected each year; and we think the notice which the act re-

quired is sufficient to constitute due process of law."

House v. *Road Improvement Dist. No.* 2, 158 Ark. p. 343.

The Eighth United States Circuit Court of Appeals has heretofore in a case against a levee district, held that the decision of the Arkansas Legislature is not subject to change by the courts and has quoted approvingly from the Arkansas cases heretofore cited:

> "There is no allegation in the bill that in determining this location, the directors acted in an arbitrary and unreasonable manner. There is no allegation that they did not employ competent engineers. If the legislature had in the act itself located the line in the same place where the directors did locate it, and if it had in the act itself fixed the same height for the levee which the directors afterwards did (both of which things the legislature had the undoubted right to do), it could not for a moment be contended that an allegation such as is found in the bill would require the court to enjoin the prosecution of the work thus ordered by the legislature. Such an allegation would amount to nothing more than the opposition of the opinion of the railway company to the opinion of the legislature."

In *Moore* v. *Board of Directors*, 98 Ark. 113, at page 117; 135 S. W. 819, at page 821, the court said:

> "It will be seen from this that the court held that only an arbitrary and manifest abuse of power by the legislature would be reviewed, and not merely mistakes of judgment. To hold otherwise would be to take away from the lawmakers the powers committed to them and to substitute the judgment of the courts, requiring the latter to

review every matter alleged to have been erroneously determined by the legislature. It is only an arbitrary determination of the lawmakers, made without just and reasonable basis, that the courts should review. We said in *Louisiana & Ark. Ry. Co.* v. *State*, 85 Ark. 12, 106 S. W. 960. 'The legislative determination should be and is conclusive, unless it is arbitrary and without any foundation in justice and reason.' Nor can the courts review merely on general allegations that the assessments are 'arbitrary, excessive and confiscatory.' Facts must be pleaded which show that the decision of the law makers was not merely erroneous, but that it was manifestly outside of the range of the facts so as to amount to an arbitrary abuse of power; for nothing short of that will authorize a review by the courts."

In *Salmon* v. *Board of Directors*, 100 Ark. 366, at page 369, 140 S. W. 585, at page 586, the court said:

"Again, it is alleged in the answer, and it is now insisted, that the benefits to the land in question to be derived from the improvement will not be commensurate with the amount of assessments levied, and that the annual assessment should not have exceeded 4 per cent of the valuation of the lands, which amount appellant tendered in court. The legislative branch of the government is, as we have said in several cases, the sole judge in the matter of creating improvement districts of this character, in establishing the boundaries thereof, and in determining, or in providing means for determining, the amount of assessments based on benefits, and the courts will not interfere unless an arbitrary and manifest abuse of the power is shown. Mere mistakes of the lawmakers, or of those empowered by the lawmakers to make assess-

ments, in fixing the amount or rate of assessment, will not be reviewed and corrected by the courts. *Moore* v. *Board of Directors Long Prairie Levee District*, 98 Ark. 113, 135, S. W. 819; *Board of Improvement* v. *Pollard*, 98 Ark. 543 S. W. 957."

"The decree of the court below is affirmed."

St. Louis Southwestern Ry. Co. v. *Board of Directors of Miller Levee District No. 2*, 207 Federal Reporter, page 342.

The decisions of the Arkansas Supreme Court holding that the finding of the legislature is decisive as to the property benefited, is in accord with the leading text writers on this subject and with the decisions of the United States Supreme Court.

"The whole subject of taxation belongs to the Legislature. So much is unquestioned. The authority may be exercised directly, or in case of local taxes, it may be left to local boards or bodies. If the Legislature has fixed the district and levied the tax, for the reason that in the opinion of the legislative body such district is plenteously benefited, its action must, in general, be deemed conclusive."

Cooley on Taxation.

"The rule thus laid down is a general one, applicable to all improvements of the class with which it deals, and the benefits thus fixed are the same for all property similarly situated with regard to the improvement. An attempt to determine benefits separately for each tract of land would probably, on account of the varying conditions of the evidence and the varying attitude of mind of the judge or jury which is to determine such questions, lead to as many different results as there were different tracts of land involved in separate proceedings. The adoption of a legislative rule determining the amount and apportionment of benefits brings order out of what might in the absence

of some fixed rule, come very near being chaos."

Page & Jones, on Taxation by Assessment.

"In exercising its power, the Legislature may either act directly, determining the area benefited and the rate of apportionment absolutely; or it may delegate to local authorities the power to decide as to the necessity of the improvement, and this delegation may cover all or any of these points. The Federal Supreme Court holds that the Legislature, acting directly, may determine the district benefited by a public improvement and lay down an absolute rule as to the apportionment of the expense among the parcels of land included. When this course is adopted, the act of the Legislature must be deemed conclusive alike of the question of the necessity of the work and of the benefits as against the abutting property, and to open such questions to review by the courts upon the petition of any and every property holder would create endless confusion."

McGehee on Due Process of Law, 248.

We quote below from the U. S. Supreme Court decisions to the effect that the Legislature may determine the area and property benefited, leaving to the commissioners the apportionment of the taxes and when it does so, its action is conclusive and beyond review.

"The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review." * * * "The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to

our review. The question of special benefit and the property to which it extends is of necessity a question of fact; and when the Legislature determines it in a case within its general power, its decision must of course be final." * * * "When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the Legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited.

In determining what lands are benefited by the improvement, the Legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

Spencer v. *Merchant*, 125 U. S. page 345.

"It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of

what is termed the apportionment of the tax, *i. e.*, the amount of tax which he is to pay."

Fallbrook Irrigation District v. *Bradley*, 164 U. S. page 155.

We cite below various cases with which this court is so familiar that we refrain from making excerpts.

Kelley v. *Pittsburg*, 104 U. S. page 78; *French* v. *Barber Asphalt & Paving Co.*, 181 U. S. page 324; *Webster* v. *Fargo*, 181 U. S. page 394; *Cass Farming Co.* v. *Detroit*, 181 U. S. page 396; *Davidson* v. *New Orleans*, 96 U. S. page 97; *Houck* v. *Little River Drainage Dist.*, 239 U. S. page 260; *Wagoner* v. *Lesser*, 239 U. S. page 218; *Bauman* v. *Ross*, 167 U. S. page 548.

Counsel is quite familiar with the cases relied upon by the attorneys for the pipe line company, *Norwood* v. *Baker*, 172 U. S. page 269; *Myles Salt Co.* v. *Drainage Dist.*, 239 U. S. p. 478; *Gast Realty Co.* v. *Snyder Granite Co.*, 240 U. S. page 57.

Also with the recent cases that have gone up to the Supreme Court from Arkansas, *Kansas City Southern Railway Co.* v. *Road Improvement District No.* 6, 256, U. S. page 659; and *Thomas* v. *Kansas City Southern Railway Co.*, 261 U. S. page 483.

The decision in each one of the five cases last above cited was made because the court found under the peculiar facts in each of said cases that the assessment was so grossly discriminatory as to be unjust and absurd.

In the instant case the facts as developed from the testimony show a substantial benefit to the pipe line company, certainly fully as much benefit as will be received

by many thousands of lots in the City of Texarkana against which, just as in the case of the pipe line, an assessment of benefits has been made equal to the assessment against each of said lots for county and state taxes.

Recent decisions of the U. S. Supreme Court quote at length from the cases we have heretofore cited, and reaffirm the holding therein set forth. Said recent cases also refer to the five cases above cited on which the attorneys for the pipe line company must depend and distinguish said five cases because of the finding that no benefit could be received under the peculiar state of fact set forth in said cases.

The witnesses for the pipe line company in their testimony, admitted that a benefit was received by the parties working on the pipe line, by those hauling for the pipe line company with trucks and wagons and that a benefit was received by the owners of the pipe line in the access given by the roads to their officials, laborers and employees, who had to work on, repair and rebuild the pipe line, but in the testimony, they asserted such benefit was received by the owners, employees, teamsters and laborers of the pipe line company, and none by the pipe line itself.

Said testimony admits that some one received a benefit from the building of the roads, but attempts to distinguish between an inanimate object or tract of land and the person having the beneficial ownership of same, which appears to be sophistry. One might as well say a tract of farm land should not pay taxes for the road because the owner and not the land uses

and passes over the road. One might as well say that the city lot should not pay an assessment for water works or sewerage, since the owner of the house on the lot, and the party living in the house are the ones to get the benefit from the water and sewerage and not the house and lot.

The testimony of the plaintiff's witnesses showed that originally one line of pipe was laid on the right of way, and afterwards during 1920 to 1924, three additional lines of pipe were laid, and the attorney for the pipe line company asked the witnesses if such pipe before being laid was not personal property.

The pipe line and right of way were assessed the benefits to be received from the road, and although pipe not attached to the soil do not become real estate until laid on the right of way, yet after being laid so as to become part of the right of way, they change from personal to real property just as the lumber and brick change when built into a house, from personal to real property.

The testimony of plaintiff's witnesses showed the average cost "stringing" or hauling and delivering pipe on the right of way to be $400.00 per mile although they stated that such cost at times would run to as much as $1000.00 per mile.

They admitted (what is a patent fact without such admission), that it is cheaper to haul over a hard surface than over a dirt road.

The testimony showed without contradiction that three times as many pipe could be hauled at a load over hard surface roads as over dirt roads, and the

testimony of witnesses was introduced that one-half of the hauling cost could be saved by using the good roads.

Three lines of pipe along the entire right of way, twelve and three-quarters (12.75) miles, have been laid in the last four years, and if one-half of the cost of hauling has been saved, $200.00 per mile, on more than 37 miles, the road in four years has saved the pipe line company $7500.00, about two-thirds of the total benefits that will be collected, and we may presume that during the remaining eleven years an equal amount of saving will be effected from the hauling of pipe for construction and repair purposes. It would therefore seem that a very definite and direct benefit from the building of the road has been had by the pipe line company.

In the case of *Branson* v. *Bush*, the circuit court of appeals enjoined the collection of the tax. The legislature had ascertained and declared that the road and all other real property in the district would be benefited more than the cost of the road and had assessed against the railroad and each tract of real estate a benefit equal to the assessment for state and county purposes. Four employees of the railroad company gave as their opinion that the railroad could receive no benefit from the improvement and the circuit court of appeals held that the evidence showed that railroad derived no benefit from the road. The supreme court set aside this holding as the evidence was not sufficient to show the action of the General Assembly to

be arbitrary, capricious or confiscatory in declaring the railroad benefited, citing from *Spencer* v. *Merchant*, and holding as follows:

> "It is decided that if the proposed improvement is one which the state had authority to make and pay for by assessments on property benefited, the legislature, in the exercise of the taxing power, has authority to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited by it; and if it does so its determination is conclusive upon the owners and the courts, and the owners have no right to be heard on the question whether their lands have been benefited or not."
>
> *Bush* v. *Branson*, 251 U. S., page 189.

In the case of *Valley Farms Co.* v. *Westchester County*, a large area of land was assessed to build a trunk sewer using the county and state assessment as the measure of benefits; because of the location of said land in a valley, the property could not connect with the sewer without tunnelling through certain hills and four miles of connecting line would have to be built at probably a cost of $300,000.00 to use the trunk sewer.

The contention was made that no notice of hearing upon the apportionment of the assessments had been given, and the tax, without any opportunity to use the sewer save at an expenditure of $300,000.00 was palpably arbitrary and an abuse of legislative power.

After citing from many of the cases hereinbefore set forth the supreme court held: That the fact of the additional expense required to be made to use the

sewer did not show that the lands were arbitrarily included and that they were subject to said tax:

> "The doctrine has been definitely settled that, in the absence of flagrant abuse or purely arbitrary action, a state may establish drainage districts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits."
>
> *Myles Salt Co.* v. *Iberia & St. M. Drainage Dist.; Gast Realty & Invest. Co.* v. *Schneider Granite Co.*, and *Kansas City Southern R. Co.* v. *Road Improv. Dist. supra*, present facts deemed sufficient to show action "palpably arbitrary, and a plain abuse" of power. Here the allegations make out no such situation. All lands within the district ultimately may be connected with some portion of the sewer, and we cannot say they derive no benefits therefrom, or that any were included arbitrarily, or for improper purposes.
>
> It was unnecessary for the legislature to give notice and grant hearings to owners before fixing the boundaries of the district so as to include their lands, and prescribe the method of taxation. And it is unimportant that the sewer had been completed before the boundaries of the present district were established.
>
> *Phillip Wagner* v. *Leser, supra.*
>
> *Valley Farms Co.* v. *Westchester County*, 261, U. S. p. 164.

In the Colorado tunnel case heretofore cited, the decision of the legislature was held binding, even though direct and immediate benefits could not be shown to the land. The same benefit being received by lands within the taxed district as by other lands of the state not taxed. The supreme court upheld the classification of the Colorado Legislature as follows:

"Classification as to special benefits. It is contended that no special benefits of a direct and immediate character will accrue from the tunnel to the lands lying within the district, as distinguished from the other lands in the state, and that hence the classification made by the act in providing for the assessments solely upon the lands within the district, is entirely unreasonable and arbitrary. It is well settled, however, that if a proposed improvement is one which the state has authority to make and pay for by assessments on property benefited, the legislature in the exercise of the taxing power has authority to determine, by the statute imposing the tax, what lands may be and are in fact benefited by the improvement; and if it does so, its determination is conclusive upon the owners and the courts and cannot be assailed under the 14th Amendment unless it is wholly unwarranted, and a flagrant abuse, and by reason of its arbitrary character is mere confiscation of the particular property."

Millheim v. *Moffatt Imp. Dist.*, 262 U. S., page 721.

In a recent road case arising in Arkansas, taxes were assessed against a railroad on an *ad valorem* basis to pay the debts of an abandoned road district. Such legislative assessment of benefits against the railroad was upheld by the supreme court and the decision was affirmed on the further ground as follows:

"So far as concerns the Federal Constitution, the validity of the tax may be rested, also, on other grounds. A state may defray the cost of constructing a highway, in whole or in part, by means of a special assessment upon property specially benefited thereby. But it is not obliged to do so. Road building is a public purpose which may be effected by general taxation. The cost may be defrayed

out of state funds, or a tax district may be created to meet the authorized outlay."

Missouri P. R. Co. v. *Western Crawford Road Imp. Dist.*, 266 U. S. p. 190.

On the same day the famous House case given so much notoriety by the New York Times was decided, the court holding:

"This cause grew out of the creation of District No. 5, Conway County, by Act No. 245, and assessment for benefits thereunder. With one exception the questions now raised are the same as those in cause No. 92. As an additional ground for challenging the statute plaintiff in error claims that it is arbitrary and beyond the power of the legislature because the proposed improvement could not benefit plaintiff's lands, while other lands actually benefited were not included. The record does not show that this objection was placed upon any federal ground in the courts below; but assuming that the point was properly made, we think it is clearly without merit. *Houck* v. *Little River Dist.*, 239 U. S. 254, 265, 60 L. Ed. 266, 274, 36 Sup. Ct. Rep. 58; *Miller & Lux* v. *Sacramento Drainage Dist.*, 256 U. S. 129, 130, 65 L. Ed. 859, 863, 41 Sup. Ct. Rep. 404; *Valley Farms Co.* v. *Westchester County*, 261 U. S. 155, 163, 164, 67 L. Ed. 585, 590, 43 Sup. Ct. Rep. 261."

Mrs. M. L. House v. *Road Improvement District No. 2*, 266 U. S. p. 177.

In the Archer County case decided January 4, 1926, that caused such consternation among the holders of Texas bonds, the supreme court held "that due process" had not been had as there was no legislative enactment authorizing the creation of the road district. If, as in the instant case, there had been a legislative act

determining what property would be benefited by the road, the bond issue would have been upheld. We cite as follows from the court decision:

> "The legislature may make assessments for local improvements ratably on the basis of property valuation (*Valley Farms Co.* v. *Westchester County*, 261 U. S. 155, 67 L. Ed. 585, 43 Sup Ct. Rep. 261); but where the amount to be raised is determined and the property to be assessed is selected as in this case, the requirement that the burden shall so spread is not a legislative assessment.
>
> Where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the state has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits."
>
> *Browning* v. *Hooper*, 269 U. S. p. 396.

In the Arkansas road case that went from Sevier County to the supreme court, questions at law identical with the present case were involved. The zone system was used for rural property and the assessors placed assessments on the town lots and railroads in the proportion that they deemed them benefited by the road. The railroad appealed just as the pipe line company has done here on the ground that they received no benefit whatever, that their assessment was purely arbitrary and in contravention of the due process clause of the 14th Amendment to the Constitution. There, as here the legislature confirmed the assessment of benefits and there, as here, the employees of the railroad company, called as witnesses, asserted vigorously their opinion that the railroad would receive no benefit,

without advancing anything substantial in support of said opinion.

The supreme court stated that a better case might have been made if the witnesses had devoted themselves to showing that the amount of benefits assessed against the railroad was excessive instead of attempting to show that no benefit whatever would be received. The decision cited nearly all of the cases to which we have heretofore referred and distinguished between the five cases relied upon by the pipe line company heretofore mentioned. We cite from said case as follows:

> "By a long line of decisions in this court it has been settled that, where the state constitution, as construed by the state court of last resort, does not provide otherwise, the legislature of a state may require that the cost of a local public improvement such as the construction or reconstruction of a public road, be distributed over the lands particularly benefited, and charged against them according to their value, their area, or the benefits which they will receive; may itself determine what lands will be benefited and in what proportions they will share in the benefits; and may avail itself, for the purposes of that determination, of any information which it deems appropriate and sufficient, including such as may be afforded by reports and estimates made in prior assessment proceedings having the same object. Only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power, can it be said to offend the due process of law clause of the 14th Amendment. * * *
>
> And only where there is manifest and unreasonable discrimination in fixing the benefits which the several parcels will receive can the legislative determination be said to contravene

the equal protection clause of that amendment. *Kansas City Southern R. Co.* v. *Road Improv. Dist.*, 256 U. S. 658, 65 L. Ed. 1151, 41 Sup. Ct. Rep. 604; *Thomas* v. *Kansas City Southern R. Co.*, 261 U. S. 481, 67 L. Ed. 758, 43 Sup. Ct. Rep. 440.

To justify an assessment of benefits to particular lands it is not essential that the benefits be direct or immediate (*Valley Farms Co.* v. *Westchester County, supra*); but it is essential that they have a better basis than mere speculation or conjecture (*Kansas City Southern R. Co.* v. *Road Improv. Dist. supra*). In the case of railway property they may consist of gains from increased traffic, reasonably expected to result from the improvement. *Thomas* v. *Kansas City Southern R. Co., supra*; *Branson* v. *Bush*, 251 U. S. 182, 64 L. Ed. 215, 220, 40 Sup. Ct. Rep. 113.

"The special confirmatory act was recognized by the supreme court of the state as a legislative determination of the lands which will be benefited, and of the proportions in which they will share in the benefits. It therefore must be treated here as an admissible legislative assessment of benefits so far as the state constitution is concerned.

The evidence, as before outlined, falls short of showing that the assessment against the railway property was either palpably arbitrary or unreasonably discriminatory. The burden was on the railway companies to overcome the presumption attending the legislative determination, and this they failed to do; for, under the evidence produced, it is an entirely admissible view that the railway property will be substantially benefited by the road improvement, and that the benefits are fairly assessed as between that property and the farm lands and town lots. True, the amount of benefits which will accrue to the railway property is largely a matter of forecast and estimate; but the same thing is true of the farm lands and town lots, and also of benefit assessments in

general. See *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 433; *Butters* v. *Oakland*, 263 U. S. 162, 165. Forecast and estimate based on a solid premise of fact and experience are not to be confused with mere speculation and conjecture. *Kansas City Southern Ry. Co.* v. *Road Improv. Dist. No. 3*, 266 U. S. p. 381.

We call special attention to the two cases relied on by the pipe line company in the district court, *Board of Directors Miller Levee District No. 2* v. *Prairie Pipe Line Company*, 292 Fed., page 475; and *Kansas City Southern R. Co.* v. *Road Improvement District No. 6*, 256 U. S., page 660.

In the case of the pipe line company all property was assessed on an *ad valorem* basis, so the question of benefits to the property was not taken into consideration in a classification of the different kinds of property, whereas here, the assessors assessed all property on a benefit basis and placed against each piece and character of property what in their best judgment would be the actual benefit received from the building of the roads. On such benefit basis, the twelve and three-quarter (12.75) miles of right of way with the pipe lines and telegraph lines under and over said right of way, pay to the road district a maximum annual tax of six hundred dollars ($600.00); whereas in the levee case above referred to, six (6) miles of right of way with the pipe line thereunder paid an annual tax of twenty-five hundred sixty-one dollars ($2561.00). Therefore on the same proportion of mileage of right of way, in the levee case the pipe line com-

pany was assessed annually ten times the tax assessed in the instant case.

The method of assessment here being on a benefit basis and the annual tax being in the instant case less than one-tenth (1/10) of that in the Levee-Pipe Line case, we most respectfully suggest that the assessment in the instant case is not excessive in proportion to the benefits received.

In the *Kansas City Southern R. Co.* v. *Road Improvement District* case cited above, more than 25% of the assessment for road purposes was levied against the railroad track. The supreme court held such assessment excessive, but held that since the railroad would receive some benefit, an assessment for road purposes in proportion to the benefits received should be made against its track and the cause was remanded that such reasonable assessment of benefits might be made. Here only 9/10ths of one percent of the assessed benefits were laid against the pipe line right of way.

Estoppel.

In respondent's answer to petitioner's bill in equity among other defenses, estoppel was pleaded, "for the further cause that by its failure to take action to contest the validity of said assessment, petitioner is now estopped from bringing this action" (R. 32).

The evidence shows that petitioner had published legal notice and actual notice of the building of the road, that bonds were issued in the sum of $540,000.00 to pay for the road and that petitioner paids its road assessments for three years, the years of 1916, 1917 and

1918; and no action was taken during all that time to contest the validity of the tax against the pipe line company.

The Arkansas courts have held that mere silence on the part of a property owner does not create estoppel, but conduct that induces another person to spend money will create an estoppel. *Harnwell* v. *White*, 115 Ark. page 99.

Also in a later case the Arkansas Supreme Court held:

> "The appellants are estopped by their conduct in acquiescing in the construction of the improvement to challenge the validity of the proceedings at this time."
>
> *Curtis* v. *Hobson*, 127 Ark. p. 349.

In one of the circuit court of appeal cases relied on in the lower court, decided March 1, 1926, in the Supreme Court of the U. S., *Risty* v. *Great Northern Ry. Co.*, 70 L. Ed—it was held estoppel did not lie, but in that case, different from the instant one, the lands and railroad track against which an attempt was made to levy the assessment did not lie within the boundaries of the drainage district and of necessity no action or silence on the part of the railroad company could create an estoppel in favor of the district in which the railroad owned no land or track.

Bonds in the sum of $540,000.00 have been sold to build the roads in question and of said amount, over $350,000.00 are still outstanding.

If after waiting this length of time without questioning its assessment, and if after making payments

of taxes for the various years shown by the testimony, the Pipe Line Company can now raise the question of no benefits having been received, then each telephone and telegraph line, each tram road, gas pipe line and each railroad and the owner of each tract of land in the district can also go into court and question the validity of the taxes assessed against them.

If this should be allowed by the courts, all public improvements would of necessity cease as no person could afford to buy bonds with any assurance that property security for the payment of the bond issue, would not gradually be exempted so enough property would not be left to insure payment of the bonds and interest.

In *Gulf & S. I. R. Co.* v. *Ducksworth*, 286 Fed. 645, 648, (C. C. A. 5) the court said:

> "The bill does not allege that the appellant interposed any objection to the creation of said district or to the levy of the taxes in previous years, and it is fair to assume that it made none * * * It does not deny that it knew that the bonds were being issued, or that the taxes to pay the same would be a charge upon its property within said district for many years, and it would seem that it should not have stood by and permitted the bonds to be issued and sold to *bona fide* holders without promptly interposing any objection it had."

As stated by the Arkansas Supreme Court, in the House case some time must be reached when the question as to the benefits received becomes final, otherwise, one could never tell when a bond issue would be defeated, even through a valid issue, by gradual with-

drawal from taxation of all property giving security to the bond issue.

> "This action of the court must be affirmed, for there must come a time when such questions are foreclosed. It was upon the faith of these assessments that the district incurred obligations and issued negotiable bonds with which to pay them, and these bonds are owned by the investing public throughout the United States."
>
> *House* v. *Road Improvement District No. 2*, 158 Ark. p. 345.

The taxes for the years 1916 to 1918 inclusive have been paid, by the pipe line company and taxes are due for the years 1919 to 1924 inclusive. No additional road taxes will be levied against the petitioner's pipe line or any other lands in the road district, see the Martineau bill, copied as an appendix to this brief.

Below find statement showing the percentage of benefits levied each year for road taxes, the amount of taxes being the benefits, $60,000.00 multiplied by the percentage.

1916	6-2/3	mills	
1917	6-2/3	mills	
1918	7	mills	
1919	7	mills	
1920	10	mills	
1921	10	mills	
1922	10	mills	
1923	10	mills	
1924	8.5	mills	(R. 181).

The taxes for the year 1919, collectible prior to April 10, 1920, were levied under the assessment made under the original act passed during the year 1915, the taxes

for the other years were levied under the reassessment of benefits filed July 24, 1920 (R. 38). However, as shown by testimony, such reassessment of benefits made no changes in the Pipe Line Company's assessment or of the property in Texarkana, Arkansas, and only changed certain lands from one zone to another zone made necessary by the relocation of the road as built, the benefit in each zone remaining the same as in the original assessment.

Petitioner complains as to the assessment for state and county purposes of the land located in Miller Levee District No. 2, same being assessed at $10.00 per acre for the cleared land and $4.50 per acre for the wild land. Since the county and state values of the country lands were not used in assessing the benefits against said land, one cannot see just what connection such values have with the question of benefits. No complaint is made as to the assessment for state and county purposes of the land in the hills or above overflow, which are assessed at $5.00 to $6.00 per acre (R. 181), and no complaint is made as to the valuation of the real estate in the city of Texarkana, Arkansas, for state and county purposes, such valuation being used as the basis of the benefits for road purposes. The total assessment of benefits of all property for road purposes is $6,687,-178.00. The assessment of benefits for road purposes levied against the real estate in the city of Texarkana is $2,561,100.00. The assessment of benefits for road purposes of the real estate in the country outside of the City of Texarkana is $3,664,445.00. The approximate

acreage in the district is 136,322 acres and the average assessment of benefits per acre for road purposes on the country real estate is $26.88, said assessment of benefits being three to five times the amount of the assessment for county and state purposes against said acreage (R. 181).

Because of the different character of the property, a benefit for road purposes was assessed against the pipe line of the same amount as its assessment for state and county purposes and the benefit for road purposes was assessed against the real estate in the city of Texarkana of an amount equal to its assessment for state and county purposes, it therefore appears if any discrimination exists because of the assessment of benefits, such discrimination is not against the pipe line company or the real estate in Texarkana assessed for road purposes at the same amount as assessed for county and state purposes, but such discrimination is against the county real estate which is assessed for road purposes at from three to five times the amount of its assessment for county and state purposes.

The Pipe Line Company owns a right of way in the district of approximately twelve and three quarter miles, although the assessment of benefits tabulates only twelve miles. As shown by the map filed as an exhibit by petitioner, the original right of way, No. 1, was 12.61 miles and the present right of way, No. 2, is 12.88 miles.

McGrew, Vice-President of the Pipe Line Company, testified that the cost per mile of one line of pipe is $11,500.00 (R. 236), therefore using the amount of right of way shown by assessment, twelve miles, the cost for two lines of pipe that were in the ground on said right of way, when both the original and the reassessment of benefits was made, would be twenty-four (24) times $11,500.00 or $276,000.00 and the cost of the two additional lines of pipe laid during the year 1923, would be the additional sum of $276,000.00, making the cost of said four lines of pipe on the right of way, according to evidence of petitioner's vice-president, $552,000.00, therefore the assessment of benefits for road purposes in proportion to cost is approximately eleven per cent of such cost.

Petitioner claims that the court of appeals erred in holding that under a legislative determination of benefits they are forbidden to weigh the benefits against the burdens.

As was held in an Arkansas decision:

> "Fraud or demonstrable mistake can occur only when the assessments are levied on lands entirely regardless of the benefits and by reason of a manifest prejudice against the owner, or in a total and reckless disregard of his rights. If the property is benefited to any extent by the improvement, then it can be included in the district and the mere fact that the benefit assessed against it was exorbitant or excessive would not invalidate the assessment thereof" *Board of Improvement* v. *Pollard*, 95 Ark. p. 552.
>
> "The amount of benefits which an improvement will confer upon particular land—indeed

whether it is a benefit at all—is a matter of forecast and estimate * * * A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefit to that lot. * * * Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that the hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases. *Davidson* v. *New Orleans*, 96 U. S. 97, 106, 24 L. Ed. 616, 620; *Mattingly* v. *District of Columbia*, 97 U. S. 687, 692, 24 L. Ed. 1098; *Parsons* v. *District of Columbia*, 170 U. S. 45, 52, 55, 42 L. Ed. 934, 946, 947, 18 Sup. Ct. Rep. 521; *Detroit* v. *Parker*, 181 U. S. 399, 400, 45 L. Ed. 917, 921, 21 Sup Ct. Rep. 624; *Chadwick* v. *Kelley*, 187 U. S. 540, 544, 47 L. Ed. 293, 294, 23 Sup. Ct. Rep. 175;" *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. page 434.

As stated in one of the cases heretofore cited, each tax payer must accept the burdens as well as the benefits, the mistakes as well as the successes of the community in which he lives and where his property is located. Miller County has been particularly fortunate in that good judgment was used by the commissioners in laying out and in building its good roads system, and we think counsel for petitioner will agree that the benefits from such good roads have been many many times the burdens required in the form of taxes. Over the State of Arkansas as a whole such good judgment was not used and prior to the passage of the Martineau act, relieving the land from road taxes and paying off the

bonds by a five cents per gallon gasoline tax, the tax burden for road purposes became so heavy that hundreds of thousands of acres of land throughout the state were forfeited and lost to their owners because either they were unable to pay the road taxes or if able, the value of the land because of such taxes, had been so greatly reduced that the taxes amounted to more dollars and cents than the land would bring. Under the petitioner's theory, that no taxes could be collected if no benefit had been received by the land, all such land instead of being forfeited for taxes should have been relieved from the taxes.

After the expiration of time allowed by the statute creating a road improvement district, the correctness of the highway assessment is conclusive on a collateral attack, unless arbitrary on its face.

In a road district the assessments had been approved and the road constructed, the defendant failed to pay his road taxes and suit was instituted by the commissioners to collect same. The defendant filed his answer and cross complaint contesting the validity of the assessment on the ground that his property would not be benefited as the assessment against same was arbitrary and unreasonable and on the further ground that between his land and the road an impassable mountain lay, which constituted a barrier that prevented his land from having any access to the road.

The court sustained a demurrer of the road district to defendant's answer and cross-complaint. On appeal to the Arkansas Supreme Court it was held:

"The statute provides, in substance, that, after the benefits have been assessed, the list shall be filed and notice published and an opportunity given for owners of property to be heard as to the correctness of the assessments. A period of twenty days is provided in the statute for suit to contest the validity of the assessments. * * * The district was, as before stated, created directly by legislative enactment, and the validity of the district cannot be assailed except by showing that the statute is void on its face. *House* v. *Road Improvement District*, 158 Ark. 357. The defense offered by appellants to the enforcement of the taxes constitutes a collateral attack on the validity of the assessments made in accordance with the statute. In the latest case on this subject we said: 'Where the correctness of an assessment is assailed on collateral attack in a suit brought after the expiration of the time allowed by statute, the presumption in favor of the validity and correctness of the assessment is conclusive, unless the assessment is arbitrary on its face.' *Farelly Lake Levee Dist.* v. *Hudson*, 170 Ark. 1106.

There is nothing to show that the assessment of benefits in the present case is void on its face. The appraisal of benefits was a matter of judgment and opinion, and the appraisement made by the officers of the district pursuant to the statute is conclusive on collateral attack. Appellants had the opportunity to challenge the correctness of the assessments when the list was filed and notice thereof published in accordance with the statute, hence it is too late now to challenge their correctness." *Henderson* v. *Road Improvement District No.* 1, 171 Ark. page 9.

In the road district at issue in this cause, although very great and definite benefits have been received from the building of the hard surface roads, yet it would be impossible to show definitely the increase in

value received by either the pipe line or the county lands from the building of said roads. It would be equally impossible to show what benefit has been received from the building of the good roads by the thousands of lots both vacant and with buildings on same in the City of Texarkana, a city of some 15,000 people on the Arkansas side alone, yet counsel for the Pipe Line Company would hardly contend that the legislative finding of benefits against the property in the City of Texarkana and the inclusion of such city in the road district could be overcome by such proof as has been introduced in this cause.

> Counsel willingly admits that the capacity of the pipe line has not been increased by the building of the road, just as the fertility and productiveness of the farms along the road have not been increased, but the pipe line has been made accessible and the Pipe Line Company, as shown by the testimony, has gladly availed itself of the use of such roads in laying the additional three lines of pipe and in repairing the pipe line already laid. * * * Testimony was introduced showing that no crude oil is delivered or distributed in Miller County, but same is carried through pipe lines to the Standard Oil Refinery at Baton Rouge, Louisiana.
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> This court will take judicial knowledge of the fact that gasoline and lubricating oil are the principal products produced in the refining of crude oil, and that among the by-products one of the principal ones is the asphalt used in surfacing roads and streets and in roofing buildings.
>
> This court will further take judicial knowledge of the fact that gasoline and lubricating oil are largely used by motor vehicles and that the building of the good roads has been the principal cause of the marvelous increase in the use of

motor vehicles and the enormous consumption of gasoline and oil.

It therefore appears that from the building of these roads in Miller County together with the connecting good roads in Arkansas and other states, the use of the pipe line has been so increased that from the one original line, now four lines have been laid from Oklahoma through Arkansas and Louisiana to Baton Rouge; as was stated in *Branson* v. *Bush*, no agency for the development of a territory equals that of good roads.

It is respectfully submitted that the decision of the U. S. Circuit Court of Appeals should be affirmed.

HENRY MOORE, JR.,
Attorney for Miller County Highway & Bridge District.

MARTINEAU ACT.

Act No. 11 of the Acts of 1927.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. It is hereby declared to be the policy of the state to take over, construct, repair, maintain and control all the public roads in the state comprising the state highways as defined herein.

Section 2. Sections 21, 22, 23, 24, 25, 26, 27, 28, 29 and 32 of Act No. 5 of the Extraordinary Session of the Forty-Fourth General Assembly of the State of Arkansas approved October 10th, 1923, with all amendments thereof, are hereby repealed.

Section 3. The commission shall, as soon as possible, ascertain the amount of the outstanding valid bonds issued by road improvement districts in this state, the dates of the maturities thereof, and the annual interest due thereon, and it shall be the duty of the circuit clerk of each county to furnish the commission with such information. The commission shall each year, beginning with the year 1927, allot to each road district in the state now having outstanding bond issues an amount equal to its bonds maturing during the year, together with the interest payable by such districts during the year, plus a paying charge of one eighth of one per cent of bonds to be paid and one fourth of one per cent of interest to be paid, and shall certify to the State Auditor the amount alloted to each road district. The

Auditor shall issue warrants for such amounts on the state highway fund, and procure St. Louis, Chicago or New York Exchange for said amounts payable to the order of the Bank or Trust Company named as payee in the pledge or mortgage of the road district, and if more than one Bank or Trust Company be named as payee, then to one of the named payees. Such warrants shall state in the face of the warrant that it is for exchange payable to ..... Bank or Trust Company for the account of the particular Road District. Said exchange shall be mailed in all cases to the payee at least ten days before maturity or payment date of bonds or interest.

In case the appropriation of six and a half million dollars alloted to road improvement districts is insufficient to pay in full the maturing bonds and interest for the year, the commission shall allot to each district its *pro rata* of such appropriation.

On or before September 1st in each year, the commission shall certify to each road district the amount apportioned to it for the fiscal year, and the commissioners for each district shall reduce the road tax against each tract of land in the district *pro rata* in an aggregate amount equal to the contribution made from the state highway fund.

All roads of the road districts referred to in this section are hereby taken over by the state, but only such portions of said roads which are now or may hereafter be embraced in the state highway system shall be maintained by the state.

Section 4. It shall be the duty of the commission to construct the roads in the state highway system

which are not now constructed, the work of construction to be pushed as rapidly as funds are available for that purpose. The commission shall begin the work of construction in those counties in which the roads embraced in the state highway system have not been constructed by improvement districts, or in which only a small portion of such roads have been so constructed, and shall continue construction work in such counties until the completed roads in each county in the state have been brought to a parity, after which construction work shall be distributed throughout the counties so as to maintain the parity as far as practical.

Section 5. To hasten the completion of the state highway system as rapidly as possible, the commission shall for each of the years 1927, 1928, 1929 and 1930, allot for new construction a sum equal to twice the aggregate amounts allotted to road districts, and for each year thereafter, until the road system of the state is brought to a parity, shall allot as a minimum a sum at least equal to the aggregate amount allotted to road districts. To provide the funds to meet this requirement, the state shall borrow each year whatever amount may be necessary, in addition to the money derived from automobile licenses and fees, gasoline and motor oil taxes, and from Federal Aid, on such terms as to interest and maturities and subject to the limitations hereinafter set out as may be determined to be for the best interest of the highway system, and to issue state highway notes for the amount borrowed, to be secured by a pledge of the revenues derived from gasoline, motor oil, and automobile tax, and to pledge said

revenues, or so much thereof as may be necessary, for the payment of said notes, and the State of Arkansas hereby pledges to the purchasers and future holders of state highway notes that the State of Arkansas will never so long as any of said notes are outstanding permit Sections 35 and 36 of Act No. 5 of the Extraordinary Session of the General Assembly of the State of Arkansas, approved October 10th, 1923, to be repealed or amended so as to in any manner reduce the revenue therein provided for and the State of Arkansas further pledges that in the event of a substitute fuel for motor vehicles or in the event of improvement in equipment that would reduce gasoline consumption or other change of conditions that would reduce the annual revenue from gasoline, motor oil, and automobile tax below seven million five hundred thousand dollars, that in such event the state will amend said Section 35 and 36 so as to provide for an annual minimum revenue from gasoline, motor oil, and automobile tax of seven million five hundred thousand dollars, and the State of Arkansas further pledges that it will not issue in the aggregate more state highway notes than can be fully paid, with the interest thereon, from a revenue of seven million five hundred thousand dollars a year during the period beginning with the first maturity date and ending with the last maturity date of said notes.

The State Treasurer shall set aside out of the first revenues collected from gasoline, motor oil and automobile license taxes, during the first half of each fiscal

year, a sum sufficient to pay the interest on state highway notes, and the maturing notes, due and payable during the first half of the fiscal year and shall set aside out of the first of said revenues collected during the last half of each fiscal year; a sum sufficient to pay the interest on the state highway notes, and the maturing notes, due and payable during the last half of the fiscal year.

Such notes issued by the state shall be known as state highway notes, shall be signed by the Governor, the State Treasurer and the State Highway Commissioner and attested by the Secretary of State and shall state in the face of said notes that the revenues derived from gasoline, motor oil and automobile tax are pledged for the payment of such notes.

The State Auditor, with the approval of the Governor, shall prepare the form of said notes. Said notes shall be in denominations of one thousand dollars or multiples thereof, and shall be payable to bearer, but shall contain a provision for being converted into registered notes by being registered in the office of the State Treasurer. Said notes shall be negotiable paper notwithstanding they are payable out of the state gasoline motor oil and automobile tax.

The state shall sell said state highway notes only as the Highway Commission finds that funds are needed, and shall not sell more than thirteen million dollars of notes in any calendar year. No notes shall be sold until the State Treasurer shall first have advertised for bids in newspapers, periodicals, or financial

journals selected by him, the advertisement to be published not less than twenty (20) days before the day of sale. All bids shall be opened in public, and the state shall have the right to reject any and all bids, and may, if it deems best, auction the sale of such notes.

The Governor, State Treasurer, Secretary of State, State Auditor, and State Highway Commissioner shall constitute a board with full authority to contract the sale of state highway notes.

All proceeds from the sale of state highway notes shall be deposited with the State Treasurer to the credit of the State Highway Fund.

When any such notes shall have been issued, they shall be registered in the office of the State Auditor in a book to be provided by him for that purpose and he shall endorse on each note his certificate that in the issuance thereof all the conditions of the law have been complied with, and shall sign such certificate and authenticate the same with the seal of his office.

Section 6 requires bond to be made by the successful Contractor.

Section 7, requires all members of the State Highway Commission, and all engineers and employees to take the oath of office as set forth in said section.

Section 8, authorizes refunding of taxes where gasoline purchased is used for agricultural, industrial and domestic purposes.

Section 9. No road improvement district receiving aid under this Act shall incur any further expense for compensation to the commissioners, officers, or agents of the district, but this shall not apply to expenses for necessary litigation.

Section 10. Section 33 of said Act No. 5 is hereby amended to read as follows:

"There is hereby appropriated out of any moneys now or hereafter in the State Highway Fund, to be paid during the fiscal year beginning the first day of March, 1927, and ending the last day of February, 1928, the sum of two hundred and seventy-five thousand dollars and during the fiscal year beginning the first day of March 1928, and ending the last day of February, 1929, the sum of two hundred and eighty thousand dollars to pay the salary of the Commissioner of State Lands, Highways and Improvements, all expenses of the office of the Highway Department, and expenses of the members of the advisory board, the salaries and other pay of the highway engineers employed by the commission, the salaries and other pay of such other employees of the commission as the commission may deem necessary, the salaries of employees of the State Land Department, the cost of all office supplies, printing, office equipment, automobile tags, and premiums on surety bonds.

There is hereby appropriated out of any monies now or hereafter in the State Highway Fund, to be paid during the fiscal year beginning the first day of March, 1927, and ending the last day of February, 1928, the sum of five hundred and eighty-five thousand dollars; and during the fiscal year beginning the first day of March, 1928 and ending the last day of February, 1929, the sum of one million one hundred and twenty-five thousand dollars for the payment of interest on State Highway notes.

There is hereby appropriated out of any monies now or hereafter in the State Highway Fund, to be paid during the fiscal year beginning the first day of March 1927, and ending the last day of February, 1928, the sum of two million five hundred thousand dollars and during the fiscal year beginning the first day of March, 1928 and ending the last day of February, 1929, the sum of two million seven hundred and fifty thousand dollars, for the repair and maintenance of the roads and bridges embraced in the State Highway System.

There is hereby appropriated out of any monies now or hereafter in the State Highway Fund, to be paid during the fiscal year beginning the first day of March 1927, and ending the last day of February, 1928, the sum of six million five hundred thousand dollars and during the fiscal year beginning the first day of March, 1928, and ending the last day of February 1929, the sum of six million five hundred thousand dollars, to be allotted by the State Highway Commission to road improvement districts as provided in Section 3 of this Act.

There is hereby appropriated out of any monies now or hereafter in the State Highway Fund, to be paid during the fiscal year beginning the first day of March, 1927, and ending the last day of February, 1928, the sum of thirteen million dollars; and during the fiscal year beginning the first day of March, 1928 and ending the last day of February, 1929, the sum of thirteen million dollars, for the construction of roads and bridges embraced in the State Highway System.

The unused portion of any of the foregoing appropriations made in this section for the fiscal year beginning March 1, 1927 may be used for the same purpose during the fiscal year beginning March 1st, 1928, as an additional appropriation for the fiscal year beginning March 1st, 1928.

There is hereby appropriated out of any monies now or hereafter in the State Highway Fund, to be paid during the fiscal year beginning the first day of March, 1927, and ending the last day of February, 1928, the sum of one million two hundred eighty-eight thousand eight hundred fifty-four dollars and seventy-five cents for aid to County Highway funds of the counties that received aid from state highway fund in 1926, to be distributed on or before June 30th, 1927, to those counties which received aid from the State Highway fund in 1926 for use on the county roads, each of said counties to receive from this appropriation a sum equal to the amount allotted to it in 1926 for such purpose, said amount to be paid in the same manner as paid in 1926.

There is hereby appropriated out of any monies now or hereafter in the State Highway Fund, to be paid during the fiscal year beginning the first day of March, 1928, and ending the last day of Februray, 1929, the sum of one million four hundred sixty-eight thousand two hundred thirty-six dollars and sixty-five cents for aid to County Highway Improvement funds of all the counties of the state, to be distributed on or before June 30th, 1928, as follows:

To each county in which, by the terms of the Act hereby amended, the portion of its allotment from the State Highway fund for its county highway improvement fund was 25% or more of its total allotment, a sum equal to the amount apportioned to it in 1926 for its county highway improvement fund, to each county

in which such portion was less than 25% of its total allotment, a sum equal to 25% of its total allotment in 1926; said amounts to be paid in the same manner as paid in 1926.

The balance of the appropriation of three million dollars specified in Item 17 of Section 1 of Act No. 159, approved March 9, 1925, unexpended on January 1st, 1927, shall not be paid, but shall remain in the state highway fund as a part thereof.

The balance of the appropriations provided for by Act No. 159 of the Acts of 1925, approved March 9, 1925, unexpended on March 1st, 1927, shall not be paid but shall remain in the state highway fund as a part thereof.

All laws and parts of laws in conflict with this Act are are hereby repealed.

Section 11. All suits involving the validity of this Act or any portion thereof shall be deemed matters of public interest, and shall be advanced and disposed of at the earliest possible moment, and appeals in such suits must be taken and perfected within thirty (30) days from the date of the judgment or decree.

If any provision of this Act shall be held to be unconstitutional, such holding shall not affect the validity of the remaining provisions of this Act.

Section 12. It is ascertained and hereby declared that the appropriations herein made are for the purposes of defraying the necessary expenses of the state government; that the defective condition of the public roads is a standing menace to the traveling public, so that the immediate operation of the Act is essential for the protection of the public safety, and an emergency is therefore declared; and this Act shall take effect and be in force from and after its passage.

Approved: February 4th, 1927.